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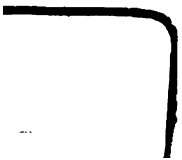
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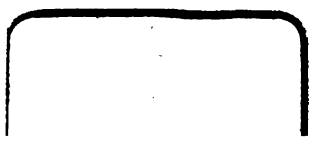
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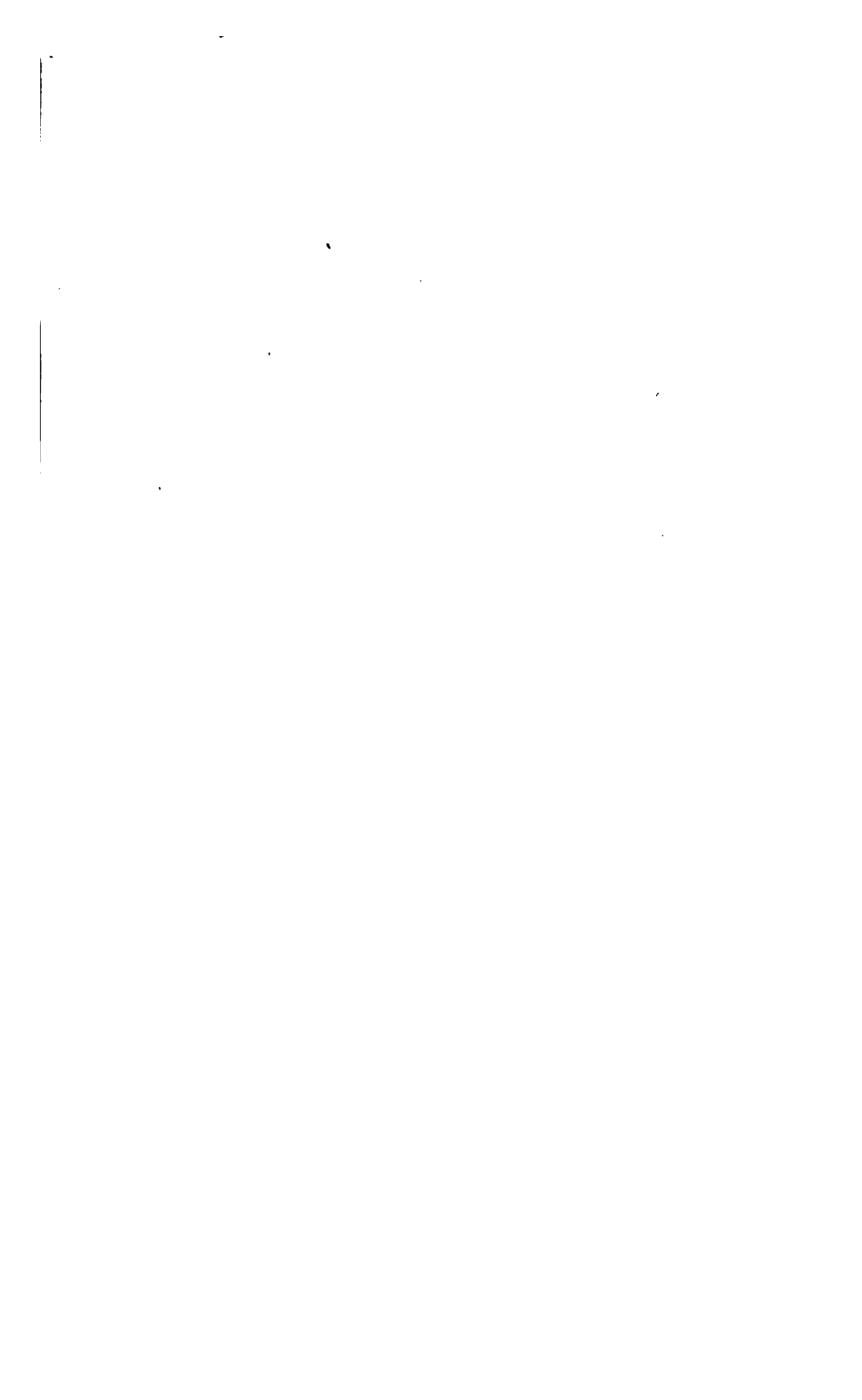
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REPORTS
OF
CASES IN BANKRUPTCY,

ARGUED AND DETERMINED

IN
THE COURT OF REVIEW *in Part*

AND ON
APPEAL BEFORE THE LORD CHANCELLOR,

WITH
A DIGEST OF THE CASES
RELATING TO
BANKRUPTCY IN ALL THE CONTEMPORANEOUS REPORTS.

BY
BASIL MONTAGU, EDWARD E. DEACON,
AND
JOHN DE GEX, ESQS.
BARRISTERS AT LAW.

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CASES IN BANKRUPTCY

ARGUED AND DETERMINED

IN

The Court of Review, &c.

MEMORANDUM.

November 25th 1842. His Honour Sir JOHN CROSS died suddenly this day at his house in Whitehall Place, not two hours after leaving the Court apparently in perfect health. And in the course of this term, Mr. Justice ERSKINE, having resigned the office of Chief Judge of the Court of Review, The Right Honourable Sir JAMES LEWIS KNIGHT BRUCE, one of the Vice-Chancellors, was appointed to that office.

Ex parte THOMAS JACKSON and HENRY HOLDSWORTH.

—In the matter of GEORGE MOODY.

SPECIAL CASE.

THE substance of the special case was as follows. The petitioners were the assignees, under the Act for the Relief of Insolvent Debtors, of an insolvent named *Eli Rushton*, who, before taking the benefit of the Act, had proved under the present bankruptcy for 84*l.*, and received the first dividend thereon.

After his discharge, and the appointment of the petitioners as his assignees, a second dividend was declared, amounting on that debt to the sum of 7*l.* 3*s.* 8*d.*, where-

is such a refusal to pay the dividend, as entitles the creditor to an order upon petition at the costs of the assignees, personally.

Westminster,
November 5,
1842.
Coram Lord
Lyndhurst, C.

After a dividend has been declared, a party entitled in respect of a proof requests the assignees, by letter, to send him the amount of his dividend in a post office order, promising to send a receipt by return of post. The assignees send no answer. *Held*, that this

1842.

 Ex parte
 JACKSON
 and another.

upon the acting assignee, under the bankruptcy, sent the following letter to Mr. Bennett, the solicitor for the petitioners at Halifax in Yorkshire.

" Re Moody.

" Manchester, April 27th 1840.

" The second dividend on this estate of 1s. 8d. in the pound, due to the estate of Eli Rushton, amounts to 7l. 3s. 8d., for payment of which, it will require the joint order of the insolvent and his assignees."

The dividend was afterwards, notwithstanding this notice, paid to the insolvent, without the knowledge or consent of the petitioners; but when it was so paid did not appear.

In the following year, the petitioners addressed a demand in writing to the assignees in the bankruptcy, who were the present respondents, requiring payment of the dividend to the petitioners, or one of them, and also giving them notice, that if the same were not paid before the 1st May then next, a petition would be presented to the Court of Review to enforce the payment. The acting assignee under the bankruptcy, on being served with this notice, told the bearer of it, that on having a sufficient receipt, he would pay the money to him; but the bearer said, as the fact was, that he had no authority to receive it, but merely to deliver the notice. A few days afterwards, the assignee under the bankruptcy received, from the solicitor to the petitioners, the following letter.

" Moody's bankruptcy, Re Rushton's assignees.

" Halifax, May 4th 1841.

" Mr. Newton informs me that you would have paid him my client's demand, namely 7l. 3s. 8d., had he had the authority to receive it. I am authorised to receive

CASES IN BANKRUPTCY.

3

it, and upon receiving a post office order from you for the amount by return, I will send you a receipt. If this communication be not attended to, I shall be compelled to have recourse to legal means to enforce the payment.


“(Signed) H. B. BENNETT.”

No answer was given to that letter, and after waiting about six weeks longer, the petition was preferred, which was the subject of the present appeal, praying that the respondent might be ordered to pay the said dividend to the petitioners, together with their costs incident thereto.

Upon being served with the petition, the respondents offered to pay the sum in question, but refused to pay the costs of the petition, and the offer was declined on the part of the petitioners.

The petition came on to be heard before Sir *John Cross*, on the 15th January last; and it was contended by the learned counsel on the part of the respondents, that the petition ought to be dismissed with costs, for that the petitioners had given no evidence of their title as assignees of the insolvent, nor tendered a sufficient receipt. Nevertheless, the learned judge considered and determined, that in fact the respondents had all along admitted the right and title of the petitioners, and had wholly neglected to answer the letter of the petitioners' solicitor, or to signify what receipt they required, and that the petition was rendered necessary by their wilful default; and thereupon ordered and decreed, that the respondents, the assignees under the bankruptcy, should forthwith pay to the petitioners the sum of 7*l.* 3*s.* 8*d.* and should also personally pay the petitioners' costs, and not be paid their own costs of the application out of the bankrupt's estate. From this decision the assignees in the bankruptcy now appealed.

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Ex parte
JACKSON
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JACKSON
and another.

Mr. *Anderdon*, for the appellants. The decision of the Court of Review is opposed to the settled rule, that a mere trustee is not bound to travel to his *cestui que trust* to pay trust monies. The latter must come to the trustee, and tender him a sufficient release, before he can have the fund paid to him. The rule is perfectly kept in view in the section of the Bankrupt Act applicable to the present question. Formerly the creditor could have sued the assignee at law for the amount of the dividend; now, however, the 111th section of the 6 *Geo.* 4. c. 16., enacts, that no such action shall be brought, but that if the assignees shall refuse to pay the dividend, the Lord Chancellor may upon petition order payment thereof; showing therefore, clearly, that the creditors must apply for the money. What gives still greater force to this conclusion is, that in the former act, 49 *Geo.* 3. c. 121. s. 12., the remedy was given, if the assignees "*omitted*" to pay it; which word is left out in the statute now in force. There has been no refusal here, nor indeed has any proper demand been made. The proposal that the assignees, without having any receipt, voucher, or proof of payment, were to take the trouble of sending a post office order, cannot be considered such a demand; nor a demand which the assignees were bound to attend to. The request was not conveyed in such terms as to induce the assignees to comply with it as a matter of courtesy; and, if it had been, that circumstance would, of course, have no influence upon the Court, which has only to decide on the legal rights of the parties.

Mr. *Roupell*, and Mr. *Rogers*, for the respondents. This is an appeal for costs only, it not being disputed but that the prayer of the petitioner must be granted,

and the dividend paid to the petitioners. Now no appeal is given by the act on a question of costs, the statute being in this respect only conformable to the ordinary practice in Courts of Equity. Independently of this objection, which however is a fatal one, the petitioners have in fact refused to pay the dividend; for a failure to comply with a demand of payment is, in fact, a refusal. The latter was a sufficient demand of payment; the appellants need not have adopted the mode of payment there suggested, but if they did not choose to do so, they were bound to seek out the creditor and pay him. The dividend, as soon as declared, was money had and received by the appellants for the use of the respondents, and might, until the form of remedy was altered by statute, have been recovered in an action of assumpsit (a), in which it never could have been maintained that the creditor was bound to seek out his debtor and demand payment of his debt, before bringing his action. The alteration in the remedy cannot affect the nature of the obligation, and the law on the subject was settled as long ago as the time of *Littleton*, who says (b), "If a man be bound in an obligation of 20*l.*, upon condition, endorsed upon the same obligation, that if he pay to him, to whom the obligation is made, at such a day, 10*l.*; then the obligation of 20*l.* shall lose its force and be holden for nothing; in this case, it behoveth him that made the obligation, to seek him to whom the obligation is made, if he be in England, and at the day set, to tender to him the said 10*l.*; otherwise he shall forfeit the sum of 20*l.* comprised within the obligation."

1842.

 Ex parte
 JACKSON
 and another.

Mr. *Anderdon*, in reply. The appellants were not

(a) *Brown v. Bullen*, Doug. 392.

(b) *Tenures*, sect. 340.

1842.

Ex parte
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and another.

obliged to pay, without having a receipt. [The *Lord Chancellor*. Can a man owing money say, he will not pay, unless he has a receipt? I never heard that said.] With regard to the objection that the appeal is for costs only, the answer is, that if the respondents cannot make out a refusal on the part of the appellants, they had no right to petition at all.

THE LORD CHANCELLOR.—The proposal which was made by the respondents to the appellants was one of convenience, and if the latter did not choose to comply with it, they ought to have paid the dividend otherwise, or have suggested some other mode of payment than that proposed. The Court of Review considered that the omission to return an answer to this request, during the six weeks which had elapsed before the petition was presented, was such a species of wilful default on the part of the appellants, as amounted to a refusal. I agree in that view of the case, and must therefore dismiss the appeal, with costs. The costs were obviously the whole subject of contest, and must amount to more than four times the sum in dispute (a).

(a) The following clause of the new act, and the orders made in pursuance of it, seem calculated to remove the difficulty which occurred in the above case. The 5 & 6 *Vict. c. 122, s. 70.*, provides as follows, "And be it enacted, that it shall be lawful for the Commissioners of the Court of Bankruptcy, authorised to act in the prosecution of fiats in bankruptcy in London, or the major part of them, and such of the Commissioners to be appointed under this act, as shall be nominated by the Lord Chancellor for that purpose, to make from time to time, subject to the sanction and confirmation of the Lord Chancellor, General Rules and Orders for regulating the forms of proceedings, (where not provided for by this act) and the practice to be observed in every Court authorised to act in the prosecution of fiats in bankruptcy." And the 22nd of the General Rules and Orders, issued in pursuance of the act on the 12 Nov. 1842, provides, "That the official assignee shall, within one week after the declaration of a dividend, give notice by advertisement in

the *London Gazette*, and to each creditor by a printed circular letter, in the form specified in the schedule hereunto annexed (No. 9), to be sent through the post office at the cost of the bankrupt's estate, to be settled by the Commissioner, of the time and place of the delivery of the dividend warrants, as hereinafter provided, and that at such time, the official assignee will require the production of such securities, if any, as the creditor exhibited at the time of his proof; and that no dividend warrant will be delivered to the creditor holding any security for his debt, until such security shall be produced, without the special directions of a Commissioner in that behalf."

1842.

Ex parte
JACKSON
and another.

Ex parte WILLIAM WHITE.—In the matter of CATHERINE
ALEXANDRINA HALLIN.

SPECIAL CASE (a).

Westminster,
5 Nov. 1842,
and 12 Jan.
1843.
Coram Lord
Lyndhurst, C.

THE special case stated at length the petition to the Court of Review; the substance of which was, that *George Smith*, who was the solicitor of the petitioner, as petitioning creditor, and also as assignee under the fiat, had received the sum of 95*l.* 6*s.* arising from the sale of part of the bankrupt's estate while such solicitor, and that upon his being removed from the office of such solicitor, and on being examined upon oath in the matter of the bankruptcy before Mr. Commissioner *Fane*, he acknowledged to have received the said sum of 95*l.* 6*s.* under the bankruptcy, but refused to pay over that sum to the official assignee; the reason alleged for such refusal being, that the sum arose from a sale of certain goods, part of the bankrupt's estate, which the said *George Smith*, as such solicitor as aforesaid, in the early part of the year 1837, had employed an auctioneer to sell, and which goods had been seized by the sheriff of Middlesex under executions against the bankrupt, prior to the fiat,

A special case must set forth the conclusion of fact drawn by the Court below from the evidence, and not the evidence itself.

Solicitor to the fiat receiving the proceeds of a sale of goods belonging to the bankrupt, which the solicitor freed from an execution, by giving his own personal security to the sheriff by way of indemnity, has no lien on those proceeds by way of counter indemnity to himself, even though the proceeding should have taken place with the consent of the assignee.

(a) See report in the Court of Review, 2 Mont. Dea. & De G., 436.

1842.

Ex parte
WHITE

amounting to 75*l.* 2*s.*; and that the said *George Smith* had himself given an indemnity to the sheriff, who would not be satisfied with the indemnity of the assignee; and that the nature of such indemnity was, to protect the sheriff against any action or actions to be brought by the execution creditors, in respect of releasing the goods or returning *nulla bona* to the executions. And, according to the statements of the petition, Mr. *George Smith* alleged that the indemnity was given with the sanction of the petitioner, and claimed to retain the sum of 95*l.* 6*s.*, until released from his security, or until he was satisfied that the execution creditors had released the sheriff from any responsibility in respect of relinquishing the goods or returning *nulla bona* to the writs of execution.

The prayer was, that Mr. *Smith* might be ordered forthwith to pay the sum of 95*l.* 6*s.* to the official assignee, and might be also ordered to pay the petitioner the costs of the petition.

The special case, after stating that the petition was verified by the affidavit of the petitioner, and the examination of Mr. *George Smith*, and after setting out that examination verbatim, stated, that in answer to the application, an affidavit of Mr. *Smith* was read on the hearing of the petition, which affidavit was also set out verbatim, the purport of it being to verify the statement made by Mr. *Smith* before the Commissioners, as to the indemnity.

The special case then continued as follows: "The learned counsel for the respondent, the said *G. Smith*, contended that he had a right to retain the said sum of money until the expiration of six years from the time he gave the alleged indemnity to the sheriff, unless the assignees gave him a counter indemnity; and also that he

had a lien thereon for his said bill of costs. But no such written indemnity was produced or shewn to the court, nor was it stated when the money was received by the respondent, nor whether before or after the petitioner was appointed assignee, nor did the respondent shew any authority from the assignees to receive the same, nor did he allege that any sum of money was actually due and owing to him by the said assignees. Whereupon the court adjudged and determined, that the said sum of 96*l.* 6*s.* was wrongfully received and retained by the said *G. Smith* for his own use, and that he had no lien thereon; and the Court did thereupon order and direct that the said *G. Smith* do forthwith pay into the hands of the said *William Turquand*, as such official assignee as aforesaid, the said sum of 95*l.* 6*s.* received by him under the estate of the said bankrupt, and that the said *G. Smith* do pay to the said petitioner *William White* his costs of and occasioned by this application. The learned counsel for the respondent insists, that the said order or decree is erroneous in matter of law or equity, and has applied for this special case."

1842.


Ex parte
WHITE.

Mr. *Anderdon*, for the appellant. The Court of Review has not found, that no written indemnity had been given to the sheriff; it has only found that no written indemnity was produced. The non-existence of the indemnity cannot therefore be assumed; and no objection was made at the hearing in the Court below, on account of the indemnity not being produced. If called for, it might have been forthcoming. All that could now be done, would be to send back the special case to be amended, if it be imperfectly stated; but a fact, neither stated one way nor the other, cannot be

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Ex parte
Wright.

assumed against the appellant. Assuming that there was an indemnity given by the appellant with the sanction of the assignee, the appellant must be at liberty to retain the amount, which but for his indemnity would never have been realized, until he himself has a counter indemnity.

Mr. Russell and *Mr. Martindale*, for the respondent.

Mr. Anderdon, in reply.

THE LORD CHANCELLOR.—The only question appears to be at present, whether the special case is so framed, as to enable me to deal with it. I will consider whether I can dispose of it as it now stands; but it is of material importance, that the proper form of stating these cases should be well defined and adhered to.

1843.
January 12.

THE LORD CHANCELLOR.—When this question came before me in the last term, I observed upon the incorrect manner in which the special case was drawn.

By the statute 1 & 2 Will. 4. c. 56., the appeal from the Court of Review is confined to matters of law. The case therefore ought to state the facts, upon which the questions of law are to be raised. But in this instance the evidence is stated, leaving this Court to draw from that evidence the conclusions of fact, or to decide whether certain conclusions, which appear to have been drawn by the Court of Review, were properly drawn from the evidence as set forth in the case. In this mode too of stating a special case, this court may be called upon to decide upon the relative degree of credit due to the testimony of the different witnesses.

This is certainly incorrect. I have not however thought it necessary to refer the case back to the Court of Review for the purpose of its being re-stated, as I think enough appears to enable the Court to dispose of it in its present form.


1842.

Ex parte
Watts.

It is admitted, that *Smith*, the solicitor of the assignees, applied the produce of the sale of the bankrupt's property to the discharge of his own liabilities. In this he acted most improperly. He further admits, that the money is now in his hands, but he scruples paying it over, until he is secured against the effect of his indemnity. Admitting that he had a right originally to receive the money from the auctioneer, which upon the facts stated in the case is at best questionable, he was bound to pay it over to the assignees without delay. He had no lien upon it for the indemnity; but if he entered into that indemnity at the request of the assignee, he must, in the event of his being called upon to repay the money, a very improbable event, look to the assignee for compensation.

Something was said as to a lien for costs. If *Smith* had no authority to receive the money, he could have no lien upon it for his costs. But it is stated by the Court below, that it was not alleged that anything was due to *Smith* from the assignees: this is stated as a fact, and in looking at the evidence in the special case, I do not find, though a bill is said to have been submitted for taxation, that it is distinctly averred that any thing is due for costs. I cannot therefore say, that the conclusion of fact has been improperly drawn.

The judgment must consequently be affirmed; and if affirmed, it must of course be with costs.



1842.

*Westminster,
7 and 8 Nov.
1842, and
12 Jan. 1843.
Coram Lord
Chancellor.*

Ex parte VINCENT EYRE.—In the matter of ANTHONY GEORGE WRIGHT BIDDULPH, JOHN WRIGHT, HENRY ROBINSON, and EDMUND WILLIAM JERNINGHAM.—

Upon a loan of 28,200*l.* Cuba bonds by a customer to his bankers, the latter engaged to replace them "at or within the expiration of three months, if he should require them to do so," and to deposit other securities for the performance of this engagement. After the expiration of the three months, without any requisition on the part of the customer, the customer consents to an exchange of other securities for those deposited by the bankers, without any new stipulation

THIS was an appeal on a special case from the decision of the Court of Review, in the above matter (*a*). After stating the facts, and the correspondence between the petitioner and *John Wright*, as given in the former report, the special case thus stated somewhat more fully the prayer of the petitioner to the Court below :

That the Commercial Steam Packet Company's debentures for 14,500*l.*, the Maryland and New York Iron and Coal Company's bonds for 6000*l.*, the Cairo City and Canal bonds for 33,000*l.*, and the eighty New Zealand Land Company's shares, might be put up to sale by public auction, under the directions of the Court of Review, and that the petitioner might be at liberty to bid for the same respectively; and that the assignees of the bankrupt might join and concur in such sales. That the petitioner might be at liberty to go in under

as to the period of redemption; and the bankers afterwards become bankrupt. *Held*, under these circumstances, that the time for replacing the Cuba bonds became indefinite, and that the bankers were not bound to replace them, until requested to do so; and that, no such request having been made by the customer before their bankruptcy, the customer had no right to prove for the amount of the bonds under the fiat; and that the 6 Geo. 4. c. 16. s. 56., as to the proof of contingent debts, did not apply.

A customer deposits a box containing various securities with his bankers for safe custody, and afterwards grants a loan of a portion of such securities to one of the partners in the banking-house for his own private purposes, upon his depositing in the box certain railway shares, to secure the replacing of the securities thus lent. This partner afterwards, for his own purposes, and without the knowledge of the customer, substitutes the railway shares, and substitutes others of less value. *Held*, that, as the proceeds of the railway shares were not applied to the use of the partnership, the banking firm were not answerable for this tortious act of their partner for his own benefit, and consequently that the customer had no right of proof against the joint estate for the amount of the difference between the value of the shares subtracted and those that were substituted.

Held, also, that the partners were not chargeable with any loss occasioned by this subtraction of the shares, on the ground of negligence; and that even if they were, it would be a claim for unliquidated damages, and therefore not provable against the joint estate.

(*a*) See *ante*, vol. 2, p. 66.

the fiat, and prove the deficiency of the loan of 28,200*l.* Cuba bonds against the joint estate of the bankrupts, and the deficiency of the loan of 25,000*l.* Cuba bonds, either against the joint estate, or against each of the separate estates.

1842.
~
Ex parte
Eyre.

The special case then stated, that the bankrupt *John Wright* made an affidavit in opposition to the petition, whereby he deposed that the loan by the petitioner to himself of the 25,000*l.* Cuba bonds, and the deposit of shares in the London and South Western Railway, was a private transaction of his own, in which the firm of *Wright & Co.* had not any interest; that none of the other partners in the firm were parties or privies to any change or alteration in the securities; that whatever change or alteration did take place, the same was made without their or any of their knowledge or consent; that no part of the proceeds of the securities originally deposited with him, or subsequently substituted by him, were the property of the firm of *Wright & Co.*; that no part of the securities so changed or altered, or of the proceeds thereof, was received by that firm; and that *Joseph Beadle*, in the petition mentioned, though a clerk of the firm of *Wright & Co.*, was in the habit of attending to the private business of *John Wright*, and had no authority from the other partners to interfere with the securities so lodged by the petitioner with *John Wright*, and that his interference therein was solely by the direction and on behalf of *John Wright* alone.

That *Joseph Beadle* himself deposed, that, although the managing clerk of the firm, he was in the habit of attending to the private business of *John Wright*, and had no authority from the other partners to interfere

1842.


Ex parte
Eyre.

with these securities, and that his interference therein was solely by the direction and on the behalf of *John Wright*; that, from being a clerk to the firm, he was in the habit of subscribing his name, as acting for the firm of *Wright & Co.*, in private transactions relating to the individual members of the firm, as well as in matters relating to the firm; that no part of the proceeds of the securities originally deposited with *John Wright*, or subsequently substituted by him, were the property of the firm; and that no part of the securities so charged or altered, or of the proceeds thereof, was received by the firm of *Wright & Co.*

The special case then stated, that the petition was twice heard in the Court of Review before his Honour Sir *J. Cross*, who declared his opinion to be, that the petitioner had a right to prove the value of the 25,000*l.* Cuba bonds (after deducting the value of the said securities) against the separate estate of *John Wright*, only; and that, with respect to the loan of 28,200*l.* Cuba bonds, the petitioner not having required the bankrupts to replace the same before the bankruptcy, there was no provable debt in respect thereof. That by an Order then made, it was referred to the Commissioner to ascertain the value of the 25,000*l.* Cuba bonds on the 13th July 1840; and that the petitioner was declared to be a creditor of the separate estate of *John Wright* for such value. And it was ordered, that the Commercial Steam Packet debentures for 14,500*l.*, the Maryland and New York Iron and Coal Company's bonds for 6000*l.*, and the eighty New Zealand Company's shares, should be put up to sale, with liberty to the petitioner to bid, with the usual directions. And if the money to be realized

by the sale of the securities should be insufficient to pay the petitioner the value of the 25,000*l.* Cuba bonds, the petitioner was to be at liberty to prove for the deficiency against the separate estate of *John Wright*. And it was declared, that the petitioner was entitled to prove against the joint estate of the bankrupts the sum of 477*l.* 9*s.* 3*d.*, for interest on the 28,200*l.* Cuba bonds from the 5th September 1840 to the 17th December 1840; and that the petitioner had not a provable debt against the joint estate of the bankrupts, in respect of the value of the 28,200*l.* Cuba bonds.

That the petitioner was aggrieved by the said Order, and that the same was erroneous in point of law; inasmuch as the London and South Western Railway shares having been withdrawn from his box, while the same remained in the custody of the bankrupts, the bankrupts became jointly and separately liable to pay to the petitioner the amount and value of the railway shares; and that the petitioner was therefore entitled to prove, and that the Order ought to have authorised the petitioner to prove for such amount and value against the joint estate of the bankrupts. And that, with respect to the loan of 28,200*l.* Cuba bonds to the partnership, the amount and value thereof formed a provable debt against the partnership; and that the Order ought to have directed the sale of the Cairo City and Canal bonds, and the application of the proceeds of the sale, in payment to the petitioner of such amount and value, so far as the same would extend; and ought further to have authorised him to prove under the fiat against the joint estate for the deficiency, if any, after such application.

The petitioner therefore prayed, that the Order of the

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Court of Review might be reversed or revised, so as that the petitioner's rights in this respect might be declared and established.

Mr. *Bethell*, and Mr. *Purvis*, in support of the appeal. The appellant contended in the Court below, that he had a right to prove against the joint and separate estates; but the Court of Review decided that he could only prove against the separate estate. We are now to contend, that, as one of the partners in the banking-house of *Wright & Co.* was guilty of a breach of trust, all the partners in that house, who derived a benefit from such breach of trust, must be taken to be also guilty of it, and that consequently the appellant had a right to prove either against the separate or the joint estate. his Honour Sir *John Cross*, after the first argument of this case in the Court of Review, stated that it appeared to him necessary to call the attention of the Counsel to the case of *Utterson v. Vernon (a)*, decided by the Court of King's Bench in the time of Lord *Kenyon*, and which he thought had an important bearing upon the question arising on this petition; and his Honour desired that the question might be re-argued with reference to that case, which he said had been entirely overlooked. Now, with all respect for the opinion of the learned judge, we submit that the case of *Utterson v. Vernon* applied wholly to the state of things as they existed before the operation of the 6 Geo. 4. c. 16. Previous to the passing of that statute, contingent debts were not provable; but the 56th section of that statute altered the law in this respect, and rendered debts contingent at the time of the bank-

(a) 4 T. R. 570.

ruptcy, provable after the happening of the contingency. With respect to the 25,000*l.* Cuba bonds, the learned judge thought that to those the case of *Utterson v. Vernon* did not apply. On the present occasion, therefore, we have only to address ourselves to the point, as to the right of proof in respect of the 28,200*l.* Cuba bonds, and the construction of the letter of the 19th November 1839. It is admitted, that an engagement to replace stock, upon notice, is purely a contingent debt, and therefore was not formerly provable, unless notice had been given before the bankruptcy; as was determined in *Ex parte Alcock* (a). And the only ground on which that case was decided was, that the bankruptcy was not equivalent to and did not supersede the necessity of notice. But that case occurred long before the 6 Geo. 4. c. 16; and the reference of the learned judge in the Court below was to a string of antiquated decisions, without any regard to the 56th section of that statute. In *Ex parte Tindal* (b), it was decided that a contingent debt before the statute was to be considered as contingent now, and came within the operation of the 56th section. But the language of the letter of the 19th November 1839, addressed by *John Wright* to Mr. *Eyre*, does not make it even a contingent debt. [The *Lord Chancellor*. In the printed report of the case in the Court of Review, I find the engagement in that letter is to replace the bonds "at the end of three months, if required to do so."] We submit that the meaning of the expression in the letter is to replace the bonds at the end of three months, *positively*; or sooner, if required to do so. It amounted to an absolute en-

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(a) 1 Rose, 323.

(b) 8 Bing. 402.

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gement on the part of the bankers, to replace the bonds at the end of the three months, or within that time, if Mr. *Eyre* required it. [The *Lord Chancellor*. I now perceive that the exact passage in the letter of the 19th November, 1839, is, "we hereby engage to replace the said Cuba bonds at or within the expiration of three months from this date, if you should require us to do so."] In this case, the partnership of *Wright & Co.* assumed the care and custody of the property; and it is no answer to say, that the conversion of it was the act alone of *John Wright*. *John Wright* was the managing partner of the firm, and therefore the conversion must be taken to be with the consent of the whole firm, more especially as it takes place with the privity of the confidential clerk of the partnership. Moreover, entries of the transaction were made in the partnership books; and that was sufficient notice to the other partners. In *Devaynes v. Noble*, *Clayton's case (a)*, where exchequer bills were deposited with a banking firm, and were sold by one of the partners under a breach of trust, it was held that the amount of money received by the sale of them became a partnership debt, which accrued from the moment when they were sold without the consent of the creditor; and this, whether the other partners were or were not privy to the sale. [The *Lord Chancellor*. There the proceeds were applied to the purposes of the partnership.] We contend, that if the act of one partner amounts to a breach of trust, the other partners are equally liable in equity. The petitioner has a right against the partnership, in respect of the securities left by him in the care of the partnership; and it is no answer that one of the part-

(a) 1 Meriv. 579.

ners only has been guilty of any iniquity in dealing with them.

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The petitioner has two rights arising out of this transaction—one, *ex contractu*, against *John Wright*, and the other, *ex delicto*, against the partnership, by reason of the securities being deposited in the care of the banking house, and the breach of duty of all the partners in not taking proper care of them. The key of the box in which the securities were deposited was hung up in the banking house; it was accessible to any of the partners or their clerks; and therefore it must be taken, that the partners kept the key of the box. It appears, from the memorandum of the 13th July 1840, that certificates for 100 shares in the London and Southampton Railway Company were delivered by the confidential clerk of the banking house to *John Wright*. The memorandum says, “Delivered to Mr. *John Wright*.” Whose act was this delivery? The act of the banker’s servant, and that was the act of the whole partnership. The partners were bound to have had knowledge of the act. Besides, the memorandum of delivery was signed by Joseph Beadle, “for *Wright & Co.*” On the 30th July following, there was another delivery by *Beadle* of 100 more shares of the same kind; on the 21st October, another delivery of fifty shares; and on the 30th October, a delivery of the 100 remaining shares. Where goods or money are deposited with a partnership for safe custody, a breach of trust committed by one partner renders all the partners liable. In cases of trustees under a marriage settlement, or a will, it is well known that all, in a case of this kind, would be responsible for the acts of their co-trustee. Thus, in *Walker v. Symonds* (a), it

(a) 3 Swanst. 1. 75.

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was settled that a breach of trust by one of several trustees creates a joint and several debt. Lord *Eldon* there says, "Where three trustees are involved in one common breach of trust, a *cestui que trust* suffering from that breach, and proving that the transaction was neither authorized nor adopted by him, may proceed against either or all of the trustees." This doctrine was recognized also in the subsequent case of *Munch v. Cockerell* (a), and by Lord *Cottenham*, in the *Attorney-General v. Wilson* (b), where he cites Lord *Hardwicke's* judgment in *The Charitable Corporation v. Sutton* (c). In that case it was urged, that, where an injury arises from the misconduct of many trustees, each ought to be answerable for so much only as his particular misconduct has occasioned; but Lord *Hardwicke* said, if there should appear to be a supine negligence of all of them, by which a gross complicated loss happens, that he would never determine that they were not all responsible. [*Lord Chancellor*. The letter of the 19th November 1839 from *John Wright* to the petitioner says, that the £28,200 Cuba bonds were borrowed on account of the banking house, and that they engaged to replace them at or within the expiration of three months, if they should be required to do so. If therefore there was no request within the three months, the stipulation was at an end.] At the end of the three months all contingency was at an end, and the engagement to replace the bonds became then an absolute engagement in point of law. The case of *Uttersen v. Vernon* (d), so much relied on in the judgment of the Court below, does not apply, for *there* there

(a) 8 Simons, 219.

(c) 2 Atk. 400.

(b) 1 Craig & P. 28.

(d) 3 T. R. 539; 4 T. R. 570.

had been no request made before the bankruptcy to replace the stock; besides, that case was first decided one way, and afterwards another. In the subsequent case of *Ex parte Minet* (a), it was held, that there could be no proof in bankruptcy under a written undertaking to pay on one month's notice, where notice was not given before the bankruptcy of the party entering into the undertaking; the contingency in that case, therefore, entirely depended on the giving of the notice. And in *Ex parte Alcock* (b), which was a covenant by a bankrupt in his marriage settlement to transfer stock upon a month's notice, the decision proceeded on the same grounds. These cases were all before the 6 Geo. 4. c. 16. The first case on this subject, that was decided after the passing of that act, is *Ex parte Tindal* (c), already mentioned. Here, the interest on the whole £52,000 Cuba bonds was regularly accounted for by the bankers, in their running cash account with the petitioner, up to the 5th September preceding the bankruptcy. That circumstance alone, therefore, would prevent the debt from being considered as merely contingent; for in *Ex parte Elgar* (d), where a bankrupt had given three promissory notes, by which he promised to pay, after three months' notice, monies advanced with interest at five per cent., Lord Eldon said that he had conversed with the judges upon the point, and that, in concurrence with them, he thought that the payment of interest was to be considered as evidencing that the parties had dealt with the notes as an immediate debt, and that it was therefore provable under the commission. [*Lord Chancellor*. Here there was

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Ex parte
Elgar.

(a) 14 Ves. 189.

(c) 8 Bing. 402.

(b) 1 Ves. & B. 176.

(d) 2 G. & J. 1.

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a loan of Cuba bonds to be returned at or within three months, if demand was made within that period; but if after three months, no demand seems to be necessary. Does not the transaction amount to this: you lend me so much money; I promise to repay it at the expiration of three months, or within three months if demanded. How is this distinguishable from an ordinary loan? We rely on the payment of the interest, as a strong circumstance to show that the debt is not contingent; for if the principal were contingent, the interest would fall with the principal; but the payments of the interest are not disputed as being good and valid; so that they contend on the other side, that although there is no contingency affecting the accessory, there is a contingency affecting the principal.

The LORD CHANCELLOR. I do not think that the payment of interest affects the question, as at present advised. The whole transaction appears to me in the same light as a loan of stock, the borrower undertaking to replace it at or within three months, if required to do so, and to pay interest in the meantime.

Mr. *Swanston*, Mr. *Dixon*, and Mr. *Clarke*, for the respondents. The petitioner in this case is not entitled to appeal against any part of the Order relating to the 25,000*l.* Cuba bonds, inasmuch as he presented to the Court of Review a petition for rehearing(*a*), in which he confined his complaint to the Order, merely so far as regarded the loan of the 28,200*l.* Cuba bonds; and he has moreover no right to appeal against an Order, which he

(*a*) See *ante*, vol. 2, p. 84.

has, in fact, carried into execution; for he has actually bought part of the property that was ordered to be sold by the Court of Review, under a provision in the Order giving him liberty to bid at the sale. It has been decided, that where a creditor has acted upon an Order, he cannot afterwards dispute it: *Ex parte Davenport* (a); *Ex parte Green* (b). At any rate, he is bound to account with the assignees for any proceeds received by him of the securities thus purchased by him.

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With respect to the right of proof, we submit that the purchaser cannot prove against either estate, whether joint or separate. But the other side have not distinctly said what amount of debt they propose to prove; whether the nominal amount of the 28,200*l.* Cuba bonds, or the value of the bonds in the market.

Mr. *Purves*. What we propose to prove is plainly specified in the prayer of the petition.

The LORD CHANCELLOR. What they propose to prove, as I collect it, is the value of the Cuba Bonds at the time of the bankruptcy.

Mr. *Swanston*. Then that is not a provable debt, for it is only a claim for unliquidated damages. The principle laid down in *Uttersen v. Vernon* (c) applies as much now to a case like the present, as it ever did. It was not disputed in the Court below, that there was a loan of bonds to the bankrupt *John Wright*, which he engaged on behalf of the partnership to replace at or

(a) Mont. Deac. & De G. 313.

(c) 3 T. R. 539; 4 T. R. 570.

(b) Mont. & B. 90.

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within the expiration of three months, if the petitioner should require them to do so.

The LORD CHANCELLOR.—It amounts to nothing more than to a general undertaking to replace. Whatever stipulation there might have been in the first instance as to the three months, that was put an end to by the exchange of the securities after the end of the three months. Suppose there was a loan of stock, on a general undertaking to replace it. Could you bring an action for not replacing it, without a previous demand? Or, in the present case, could you bring trover for these bonds, without a previous demand on the bankers to replace them?

Mr. *Swanston*. My point is, that at all events a demand is necessary, in order to lay a foundation for proof. Here the action to be brought by the petitioner would be for recovery of the bonds, and therefore a previous demand would be necessary. There would be no breach of contract here, although the bonds were not returned before the bankruptcy. Unless there has been a breach of contract before the bankruptcy, even in cases of replacing stock, there can be no proof. This doctrine has been established ever since *Utterson v. Vernon* (a), where Lord *Kenyon* expressly says, "It is clear that where one person, previous to his bankruptcy, is indebted to another in a precise sum which is ascertained, the latter may prove his debt under the commission; but it is as clear, that where there is only a cause of action existing, where the debt is to arise on a stipulation which has not been broken previous to the time of the bankruptcy, and

(a) 4 T. R. 571.

where the debt remains to be inquired into, there the creditor cannot prove his debt under the commission, and the demand will remain undischarged by the certificate." A request therefore, in the present case, was necessary, in order to make the debt certain; for as Lord *Eldon* observed in *Ex parte Day* (a), which was another case of a loan of stock, the debt must be *due* at the time the commission issues, to enable a party to prove it; the principle there recognized being, that there must be an ascertained sum before the bankruptcy. So, in *Ex parte King* (b), it was decided by Lord *Eldon*, that no proof could be made under a bond to replace stock and pay the dividends, unless it was forfeited, either as to the capital, or dividends, before the bankruptcy. If any doubt therefore could be entertained on the point, it is clear, from the last case, that the condition must be previously broken. The same principle also was again acted upon by Lord *Eldon* in *Ex parte Campbell* (c), where on a covenant by a bankrupt, in consideration of marriage, to transfer stock immediately after the marriage, or whenever afterwards requested by the trustees, it was held that the specific time of the request must be ascertained, before proof could be allowed. So in *Ex parte The Lancaster Canal Company* (d), where bankers, on being appointed treasurers to the company, executed a joint and several bond, conditioned, that they would "when thereunto required by the said company, pay all balances in their hands;" and they had at the time of their bankruptcy a large balance in their hands as treasurers, but no demand under the bond had been made by the company before the bankruptcy; it was held

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(a) 7 Ves. 382.

(b) 8 Ves. 334.

(c) 16 Ves. 244.

(d) Mont. 27.

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that there was not a sufficient breach of the condition, to constitute a debt provable against the separate estates of the bankrupts.

It has been suggested by the other side, that in the judgment of the Court below, no reference was made to the provisions of the 6 Geo. 4. c. 16. But the objection we make to the proof is, that the demand in this case was not in its nature pecuniary, and therefore not provable. The statute has not made a demand provable, which is in its nature not provable; it has not made unliquidated damages provable. The 56th section declares, that if a bankrupt shall have contracted any debt payable on a contingency, which shall not have happened before the issuing of the commission, the creditor may apply to the Commissioners to set a value upon it, who are required to admit him to prove the amount so ascertained. What the legislature intended was, that only such a debt should be provable, on which a value could be set. What is the contingency in this case? There is some event contemplated, which has not happened. The only contingency here is, that Mr. *Eyre* may bring an action against the bankrupt *John Wright*, if the bankrupt refuses to replace the Cuba bonds, after being required to do so. This, we contend, is not a contingency within the meaning of the statute.

The LORD CHANCELLOR. Supposing there had been a demand before the bankruptcy, what do you say then? In the case of stock, there is no doubt that in that event the debt could have been proved. Here they say, that the Cuba bonds were *quasi* stock.

Mr. *Swanston*. The Court will not extend the prin-

ciple on which it has acted in cases of stock. They are an exception to the general rule, which forbids a proof for unliquidated damages. If there had been a previous demand and refusal, then it would have been open to them to argue, that there would be an ascertained debt, as in the case of stock, where the day for the re-transfer is before the bankruptcy. But even in that case the intervention of a jury would be necessary. With respect to *Ex parte Tindal* (a), which has been cited by the other side, there was a covenant in that case to pay a specific sum of money, depending merely on a contingent event.

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The LORD CHANCELLOR. That certainly was the case of a debt. The contingency there was a mere matter of calculation on the value of certain lives then in existence. The first question there was, whether the bankrupt had contracted a *debt* payable on a contingency; and the second, whether the Commissioners could set a value upon it, so as to make it the subject of proof; and it was decided, that the circumstances out of which the demand arose constituted a *debt*, and that the contingencies as to the lives were clearly reducible to a matter of calculation. The 56th section says expressly, if the bankrupt shall have contracted *any debt* payable upon a contingency.

Mr. Swanston. In the present case, the uncertainty of the calculation would be like an equation in algebra, with an unknown quantity on each side. The decision in *Ex parte Fairlie* (b) establishes that there must be a demand, to make a contingent debt provable, within the

(a) 8 Bing. 402.

(b) Mont. 17.

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56th section; for in that case, where it was expressly stipulated by three partners, that until a demand was made, an existing debt should remain a joint debt; and no demand was made previously to the bankruptcy of the partners, it was held, that the debt, though provable against the joint estate, was not provable against the separate estates of the three. Again, in *Ex parte Davis* (a), where the contingency depended upon the separation of husband and wife, and of a widow not marrying again, it was held that the case was not within the 56th section, which contemplated the proof only of such contingencies as were capable of valuation. So in *Ex parte Thompson* (b), where A. covenanted to pay an annuity, on the default of B., and A. became bankrupt before any default; it was held, that the annuity creditor could not prove against A.'s estate; as he had contracted no debt, until default was made in the payment of the annuity, either under the 54th or 56th sections of the 6 Geo. 4. c. 16. We apply these cases in this way,—The other side says that the decision in *Utterson v. Vernon* (c) is done away with by the 6 Geo. 4. c. 16. s. 56., because that section has made all contingent debts provable. But if that is so, all the cases subsequent to that statute are bad law, and the decision in the last cited case of *Ex parte Davis* could not be supported; for it was there expressly held, that the 56th section does not apply to any contingency which is not the subject of calculation. Here the demand of the petitioner was not ascertained before the bankruptcy, but rests wholly on unliquidated damages. And it has been decided, that where the bankrupt has given an indemnity bond, and

(a) Mont. 298.

(c) 4 T. R. 570.

(b) 2 Desc. &amp; C. 126.

the amount of damage is not ascertained when the fiat issues, there is no debt provable (a). So where a bankrupt had contracted for a certain quantity of oil, to be delivered to him at a future day, and his bankruptcy took place before that day arrived; it was held, that this did not constitute a debt provable under his commission, as it was uncertain whether any and what amount of damage would be sustained by the vendor (b). *Yallop v. Ebers* (c), and *Green v. Bicknell* (d), were also referred to, as sustaining the same principle.

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We have now closed our observations with respect to the 28,200*l.* Cuba bonds, and proceed to the consideration of the claim of the petitioner to prove against the joint estate the value of the London and Southampton Railway shares, which were substituted for the 25,000*l.* Cuba bonds, and which were afterwards taken from the box where they were deposited by *John Wright*. Mr. *Eyre* seeks now to establish a right of proof for the amount of the value of these shares, either against the joint estate of the partnership, or the separate estate of every one of the partners.

The LORD CHANCELLOR. This is that part of the case, as I understand it. *Eyre* had a box at the banking house, with his name on it, containing these securities; and when the bankers become bankrupt, he finds that the securities had been taken out, and others substituted, without his knowledge. It would be hard, under these circumstances, if he had not a demand against all the partners to make good the value of the

(a) *Ex parte Marshall*, 1 Mont. & A. 145; 2 Deac. & C. 589.

(b) *Boorman v. Nash*, 9 B. & C. 145.

(d) 8 Ad. & Ell. 701.

(c) 1 B. & Adol. 698.

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securities thus abstracted. It appears further, that the box, and the contents of the box, were intended to be deposited in the custody of the partners; else, why did *Eyre* leave the key of the box at the banking house?

Mr. *Swanston*. That was an arrangement between Mr. *John Wright* and Mr. *Eyre*, for the convenience of Mr. *Eyre*. The whole transaction was a private one between those two persons.

The LORD CHANCELLOR. The case states, that the bonds were placed in the custody and possession of the partners.

Mr. *Swanston*. That relates to the Cuba bonds. But the box was deposited at the bank, merely for *safe custody*; not in the nature of a trust, as where exchequer bills are handed over to one of several partners, who may in that case deal with them in the course of the partnership trade. In *Clayton's* case (*a*), which has been cited by the other side, the exchequer bills were dealt with and applied to the purposes of the partnership. Here the box was deposited with the bankers as mere bailees. The partners had no right to open it, without the permission of Mr. *Eyre*. The tort of one could not throw any liability upon the others (*b*); and yet it is contended on the other side, that on account of the misfeasance of one partner, without the knowledge of the others, they can make each partner separately liable. The only possible ground for this claim is the memorandum of the banker's clerk; but that clerk has made

(*a*) 1 *Meriv.* 579.

(*b*) See *Story on Commercial Co-partnerships*, p. 256.



an affidavit, which is set out in the special case ; and he positively swears, that, although the managing clerk of the firm, he was in the habit of attending to the private business of *John Wright*, and that he had no authority from any of the other partners to meddle with these securities, and that what he did with them was solely by the direction and on the behalf of *John Wright*. He moreover says, that, from being a clerk to the firm, he was in the habit of subscribing his name, as acting for *Wright & Co.* ; and he states expressly, that in the present instance, no part of the securities originally deposited with *John Wright*, or subsequently substituted by him, were the property of the firm, and that no part of the proceeds of any of the securities were received by the partnership firm.

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The LORD CHANCELLOR. The introduction of that affidavit in the special case is irregular. The learned judge of the Court below might have stated the facts deposed to, if he believed the affidavit. But now it is left for me to presume, only, that he believed the facts which are stated in the affidavit.

Mr. *Swanston*. The whole transaction, however, plainly shews, that the bankers in this case were simply bailees, not trustees of the property, and that they had nothing more to do with the contents of the box, than if it had been a box of plate, which it is the custom for gentlemen to deposit with their bankers for safe custody.

The LORD CHANCELLOR. When a gentleman deposits a box of plate with his bankers, he does not leave the key of it with them, as in the present case. The special

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case expressly states, that the bonds, with the box, were left by the petitioner with the bankers.

Mr. *Swanston*. Still, we submit to your Lordship, that the case of the box of plate is more analogous to this case, than that of the exchequer bills. In the case of the box of plate, the partners, or their assignees, could have no lien on it for a debt due from their customer. Supposing the assignees had thought proper to replace the bonds, and to take back the securities that had been placed in the box in their stead. They would have had a clear right to do this. But how could they do so, if the amount of the bonds, abstracted by *John Wright*, was to be considered a debt, provable against all the partners at the time of their bankruptcy?

The LORD CHANCELLOR. It may be argued thus: *Eyre* allowed the securities to be exchanged by *John Wright*, without any communication with the firm. How is the firm then to be answerable? The case states, that in a private transaction with *John Wright*, *Eyre* acceded to his request to lend him the Cuba bonds, and to substitute in their room the certificates of the railway shares. Then how are the other partners to be rendered liable? Should not *Eyre*, or *John Wright*, when the securities were thus exchanged, have informed the other partners what had been done by *John Wright*, in order to make them answerable?

Mr. *Swanston*. This is the case of a bailee, without hire; and it is laid down by Lord *Holt* in *Coggs v. Bernard* (a), that where a man takes goods into his

(a) 2 Lord R. 913.

custody, to keep for the use of the bailor, he is not answerable if they are stolen, without any fault in him; neither will a common neglect make him chargeable; but he must be guilty of some gross neglect. And it has been since decided, even in a case of a bailee of goods to be kept for hire, that the bailee is not answerable for a theft committed by his servants (*a*). *Walker v. Symonds* (*b*), and all that class of cases, which have been cited by the other side, do not apply to this; for they only decide, that where there is a joint breach of trust by several trustees, every trustee is liable.

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The LORD CHANCELLOR. In the payment of interest by the bankers on the amount of the Cuba bonds, was there any charge of commission by the bankers?

Mr. *Swanston*. It does not appear that there was. To revert to a point I was before submitting;—The petitioner does not repudiate the transaction of the substitution of the securities, but contends that he is entitled to hold the substituted securities, and to charge the firm at the same time with the value of those abstracted by *John Wright*. He cannot affirm and disaffirm the transaction. If he keeps the railway shares, he cannot claim the amount of the Cuba bonds against the firm. If he has any claim against the partnership—

The LORD CHANCELLOR. It would be by an action on the case against them for negligence, in permitting the securities to be taken out of the box; and then the former point which has been mooted would arise, namely, that it is a demand for unliquidated damages.

(*a*) *Finucane v. Small*, 1 Esp. 315.

(*b*) 3 *Swanst.* 1, 75.

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Eyre.

Mr. *Swanston*. An inquiry may be directed, if your Lordship thinks proper, as to the custom that prevails, when bankers are mere bailees for safe custody, and when securities are deposited with them in their character of bankers.

Mr. *Purvis*, in reply. The Cuba bonds are transferable by delivery, and are the subject of frequent commercial dealings. They are given for specific sums of money, the amount of the sum payable appearing on the face of them; the value of them is therefore more easily ascertained, than the value of stock. What would be the remedy at law of a creditor, if stock were not replaced pursuant to contract? An action for damages. And yet these cases show, that an agreement by a bankrupt to replace stock gives the creditor a right of proof for the value of it, under a fiat. It has been said, that the bankers here were simple bailees of this box containing property, without hire or reward, and that they had no right to open the box. But that is not so; for, the key of the box being entrusted to the partners, the contents of the box were so entrusted, and the bankers had the same right to deal with these securities, as if they had been deposited in a drawer of their own counter. Besides, the bankers in this case, as in the case of the exchequer bills, gave credit to the petitioner for the interest payable on the bonds, which they from time to time received. As to their being therefore bailees, without profit, is it no profit to bankers to receive the interest on securities in their possession, and to make use of it, until it is drawn out by their customer?

The LORD CHANCELLOR. To enable you to support

that line of argument, it must distinctly appear in the case, that the bankers did actually receive the dividends on the bonds. And if negligence is to make the partners liable, it lies with you to show plainly what is the negligence that has made them liable. Here *Eyre* allowed *John Wright* to change the securities, without making any communication of that fact to the other partners. How were they to know, therefore, that the securities were changed without his authority? To render them liable, he ought to have communicated the fact to the other members of the banking firm.

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Mr. *Purvis*. All the partners of the banking firm were answerable for the acts of their own servant, who signed the memorandums of July and October 1840, on abstracting the railway certificates from the box in which they were deposited. But, independently of these transactions, can the partners shrink from the letter of the 19th November 1839, which accompanied the second deposit? It is signed by *John Wright*, the acting partner of the banking firm, and contains the following passage: "In respect of 28,200*l.* Cuba bonds, which I borrow from you this day *on account of the house*, we deposit, as a security, 33,000*l.* Norris Town and Valley Railway bonds, and *we* hereby engage to replace the said Cuba bonds, at or on the expiration of three months from this date, if you should require us to do so." And the whole of the remainder of the letter is expressed in the plural number, plainly showing that the loan, and the engagement to replace the bonds, were entirely a partnership transaction. It is impossible to suppose that the other partners were ignorant of what was being done by the principal partner, *John Wright*, and by their

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managing clerk. Are not they liable for all the transactions in their own banking house, which are entered into by these persons on the account, and for the accommodation, of the general partnership? As to the 28,200*l.* Cuba bonds, the contingency, if any, was gone at the end of the three months. If any request was necessary, to render the engagement absolute, it was only in case Mr. *Eyre* should require the bonds to be replaced within the three months. Does the change of the securities alter the contract between the parties? There was to be no new contract, although other securities were afterwards substituted for those abstracted.

Mr. *Dixon* referred to an affidavit, made on behalf of the respondents, as to the value of the Cuba bonds.

The LORD CHANCELLOR. I cannot refer to any affidavit, except that stated in the special case, in which the fact deposed to, I presume, the learned Judge of the Court below treats as a fact established. I will consider of my judgment.

1843.  
January 12.

LORD LYNTHURST, C.—This is a special case from the Court of Review, arising out of the bankruptcy of Messrs. *Wright & Co.* No objection has been raised by the assignees as to that part of the Order, by which Mr. *Eyre* is allowed to prove, in respect of the 25,000*l.* Cuba bonds, against the separate estate of Mr. *Wright*. The principal question is, whether he is entitled to prove against either the joint or separate estates, in respect of the 28,200*l.* Cuba bonds, which were lent to the partnership. They undertook, in the first instance, to replace them at, or within, three months, if required to do so.

No application for that purpose was made ; and after the expiration of the three months, the partnership requested permission to exchange the original securities, which they had so deposited, for the Cairo bonds. This was accordingly done, but without any new stipulation as to the period of redemption. After this transaction, therefore, the time for replacing the Cuba bonds became indefinite ; and it was not incumbent upon the partnership to replace them, until they were requested to do so, on the part of Mr. *Eyre*. But, as no such demand was made before the bankruptcy, I think the Court of Review properly decided that this was not a debt that could be proved under the fiat. The statute of 6 *Geo.* 4. c. 16., respecting the proof of contingent debts, was referred to in the argument ; but it does not appear to me, that those provisions have any application to the present question.

The remaining question is, whether the partnership estate is liable for any loss, that may have been sustained by the subtraction from Mr. *Eyre's* box of the London and Southampton Railway certificates, and the substitution by Mr. *Wright* of other securities in lieu of them, without the authority of Mr. *Eyre*. It was objected, that the petitioner was not entitled to complain of this part of the Order ;—first, because, having presented a petition of rehearing to the Court of Review, he confined his complaint to so much of the Order as related to the 28,200*l.* Cuba bonds,—and secondly, because he acted upon this part of the Order, by insisting upon the sale of the substituted securities, in opposition to the wishes and remonstrances of the assignees. The Judge of the Court of Review was of opinion, under these circumstances, that Mr. *Eyre* had no right to have this question

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*Eyre*.

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raised upon the special case. I do not think it necessary to express my opinion upon this point. For, as the case has been fully argued before me, not only upon the question of form, but upon the merits, it will be more satisfactory, upon the view I have taken of the case, to determine it upon the latter ground—upon the substance, rather than the form.

It is material, for this purpose, to advert to the facts, as stated in the special case. The transaction as to the 25,000*l.* Cuba bonds, and the substitution of the railway certificates, was entirely a private and separate transaction between Mr. *Eyre* and Mr. *Wright*. The partnership had nothing to do with it. They had no interest in the railway certificates, nor, when they were withdrawn by Mr. *Wright*, were they applied in any way to the use of the partnership. The act was a tortious act, committed by one partner, not acting for the partnership, or for any partnership object, but in his separate character, and for his own individual and separate purposes. The decision in *Devaynes v. Noble* (a), which was cited, proceeded upon a very different state of circumstances. In that case, the exchequer bills were sold by the acting partners, without the knowledge of *Devaynes*, but for partnership purposes; and the money was applied to the use of the partnership. The amount therefore became a partnership debt, and the estate of *Devaynes* was of course liable. The facts of the present case were wholly different, and for the wrongful act committed by *Wright*, for his own private purposes, and under the circumstances, which I have stated, I think the partnership was not responsible.

It was contended, however, that the joint estate was

(a) 1 Meriv. 579.



liable, on another ground, viz. that, as the securities were deposited with the partnership, they were bound to see that they were not subtracted; and that they were chargeable by reason of their negligence. But Mr. *Eyre* permitted Mr. *Wright* to exchange the railway certificates for the Cuba bonds. The partnership was not consulted upon that occasion; and when Mr. *Wright* substituted the other securities for the railway certificates, why was it to be supposed, that this was not done with Mr. *Eyre's* sanction, as in the case of the former exchange? The box indeed was in the custody of the partnership. But it does not appear from the case, that they had any right to examine the contents. Mr. *Eyre* had access to it whenever he pleased, and might remove or authorize any other person to remove, whatever portion of the contents he might think proper, without consulting or asking leave of the partnership. It does not appear to me, therefore, that there is any ground for imputing negligence to the partnership in the transaction, or to charge the joint estate with the loss which Mr. *Eyre* has sustained. But supposing a case of negligence had been established, so as to render the partnership liable, this would rather, I think, be a case of unliquidated damages, requiring the intervention of a jury, than a debt to be proved under the fiat. I am of opinion, therefore, upon the whole matter, that the judgment of the Court of Review should be affirmed, and with costs.

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said, and such other stock and property as had been added or acquired by the said *James Walter Thomas*, subsequently to the dissolution of the said partnership between him and the said *Sarah Thomas*.

Several of the debts, which at the time of the death of the said *Susannah Thomas* were due and owing from the said *Susannah Thomas*, were paid by the said *Sarah Thomas*, and by her and the said *James Walter Thomas*, after the death of the said *Susannah Thomas*; and the said *Sarah Thomas* and *James Walter Thomas* also paid the funeral expenses of the said *Susannah Thomas*.

No claim was made by or on the part of any other of the next of kin of the said *Susannah Thomas* to any part of her estate or effects, until after the issuing of the said fiat.

On the 14th day of October 1840, a joint fiat in bankruptcy was issued against the said *Sarah Thomas* and *James Walter Thomas*, under which they were declared bankrupts; and *James Dowle* of Chepstow in the county of Monmouth, and *William Iles* of Bristol aforesaid, were appointed assignees of their estate and effects, and, as such assignees, the said *James Dowle* and *William Iles* sold the property and effects, which at the time of the said bankruptcy were in the possession of the said bankrupts, including all such stock, property and effects, formerly the property of the said *Susannah Thomas*, as at the date of the fiat were in or upon the said hotel.

On the 10th day of December 1840, the petitioner, *William Miles Thomas*, procured letters of administration of the estate and effects of the said *Susannah Thomas* to be granted to him out of the Prerogative Court of the Archbishop of Canterbury, and on the 8th day of June 1841, he presented his petition to the Court of Review in the matter of the said bankruptcy, alleging that the

said assignees had possessed themselves of furniture and other effects of the said *Susannah Thomas*, to the value of 1080*l.* 12*s.* 6*d.*, and that they had received, in respect of the sale of the goodwill of the business of the said hotel, 250*l.*, which the plaintiff also alleged to belong to the estate of the said *Susannah Thomas*. And the said *William Miles Thomas* by his said petition prayed, that the said assignees might be directed to account for and pay over to the petitioner the value of the said property and effects, in the said petition alleged to belong to the said intestate, and received and sold by the said assignees as aforesaid, together with the said sum of 250*l.*, or such other sum as should appear to have been produced by the sale of the goodwill of the business of the said hotel; and that all proper and necessary accounts might be taken, and directions given for effectuating the purposes aforesaid.

The petition came on to be heard in the Court of Review on the 21st day of July 1841; when the assignees contended, that under the circumstances before stated the property referred to in the petition, whatever might have been its original nature, was at the time of the said bankruptcy either the property of the said bankrupts, or one of them; or that it was in their, or one of their, order or disposition, with the consent of the true owner thereof, if there was any other true owner thereof than the said bankrupts; and that it passed, and by virtue of the said fiat became vested in the said assignees, and was distributable among the creditors of the said bankrupts, as part of their estate and effects.

The petitioner on the other hand insisted, that he was, as such administrator of the said *Susannah Thomas*, entitled to all the property and effects of the said *Susannah Thomas*; and that the furniture and effects mentioned in the petition constituted such property, and

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ought, together with the alleged amount and value of the said goodwill, to be accounted for and paid over to him by the said assignees.

On the 30th of July 1841, his Honour Sir *John Cross* delivered the judgment of the Court of Review in the matter of the said petition, and decided, that, as to goodwill, the petitioner was not entitled to any relief; but that, as to the property and effects of the said *Susannah Thomas* remaining at the time of the bankruptcy in the possession of the bankrupts, or either of them, they held such last mentioned property as executors *de leur tort* of the said *Susannah Thomas*, and that it was in such a situation as did not bring it within the meaning of the 72nd sect. of the stat. 6 *Geo.* 4, c. 16.

Thereupon, an Order of the Court of Review, bearing date the said 30th day of July 1841, was made in the matter of the said petition, whereby it was ordered that the said assignees should forthwith come to an account with the said petitioner, as administrator of the personal estate and effects of the said *Susannah Thomas* deceased, for the value of the furniture and effects of which she died possessed, and which at her decease came to the possession of the said bankrupts, or either of them, and which had been since sold by the said assignees. And, in taking such account, it was ordered that the said assignees should have credit for all debts of the said *Susannah Thomas*, the intestate, paid by the said bankrupts, or either of them, since her decease, exceeding the value of the stock in trade sold or disposed of by the said bankrupts, and that the said assignees should also account to the said petitioner for any property of the said *Susannah Thomas* received by the bankrupts since her decease, and that had come to the hands of the said assignees; and, as to the goodwill of the business of the

said hotel, the Court made no order. And the Court reserved the consideration of all further directions on the matters of the said petition, and the costs of all parties of and occasioned thereby, until after the said accounts should be taken; and the said parties, or any of them, were to be at liberty to apply to that Court relating thereto, as they should be advised.

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The assignees are advised, that the said Order is erroneous, and ought to be reversed or varied; and that it ought to have been declared, that the property and effects mentioned in the said petition passed to the said assignees under the said fiat, as part of the estate and effects of the said bankrupts; and that the petition of the said *William Miles Thomas* ought to have been dismissed.

Mr. *J. Russell*, and Mr. *Bacon*, for the appellants. We have to submit in this case, that all the property in question was in the order and disposition of the bankrupts at the time of their bankruptcy, having been left in their possession, and under their entire control, for the space of two years after the death of *Susannah Thomas*, the intestate. It was decided in *Fox v. Fisher* (a), that, where a person, entitled to take out letters of administration, neglected to do so, but remained in possession of the goods of the intestate, and became bankrupt,—and a creditor of the intestate afterwards took out administration, and claimed the goods from the assignees,—the goods must be considered as being in the order and disposition of the bankrupt, with the consent of the true owner, and that the assignees were therefore entitled to them. In that case, Mr. Justice *Bayley* said, “If we were to hold that a pos-

(a) 3 B. & Ald. 136.

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session of this sort could be defeated by administration subsequently taken out, we should make an end of the statute of James (a). The possession here would naturally induce the creditors to suppose that the goods were the bankrupt's property, and that he had, if necessary, taken out the letters of administration, as he was entitled to do." But there is one circumstance in the present case, which there was not in *Fox v. Fisher* (b), and which renders it stronger in favour of the claim of the assignees. Here there was a partnership formed in the face of the whole world, by two of the parties who were entitled to take out administration, and the business was carried on by them for two years, until bankruptcy ensues. It is therefore impossible to doubt but that they acquired a false credit in the eyes of the world, from the possession of this property. The ground of the judgment of the Court below is contained in one sentence. The learned judge of that Court says, "If the bankrupt had obtained administration before his failure, these effects would have been clearly trust property in his hands, and as such not liable to be administered amongst his creditors; and I think they were subject to all the same equities, though he was dealing with them as her executor *de son tort*, and that it is so in the hands of the assignees." How is it possible to maintain the reasoning in this judgment? It was urged on behalf of the respondents in the Court of Review, that if in the case of *Fox v. Fisher* the point had been put as upon a question of trust, the Court of King's Bench would have come to a different decision. But it is a fallacy to represent this as a case of trust. An executor *de son tort* is not a trustee. You must shew a rightful title, in order to be clothed with the character of a trustee. *Fox*

(a) 21 Jac. 1, c. 19.

(b) 3 B. &amp; Ald. 135.

*v. Fisher* is an express decision that the creditors of a bankrupt have a better right to the goods and stock of an intestate, which the bankrupt has kept possession of and dealt with in the course of his trade, than the administrator. The learned judge of the Court of Review thought that he was justified on equitable grounds in distinguishing this case from that of *Fox v. Fisher*. But we submit that there is no such equity, nor any reason why the rule in *Fox v. Fisher* should be disregarded. The whole doctrine, as to the claims of other parties to the assets of a testator, is discussed by Lord Eldon in *M'Leod v. Drummond* (a), where he reviews the decision of the Court of King's Bench in *Farr v. Newman* (b); both which decisions shew, that in ordinary cases, the effects of a testator cannot be taken in execution for the debt of the executor. But there are some exceptions to this rule, where the executor is permitted to deal with his testator's effects as his own property, and persons are induced to give him credit upon the faith of that supposition. Thus it was decided in *Ray v. Ray* (c), that, after a considerable time had elapsed from the death of a testator, equity would not restrain by injunction a creditor of an executor from taking in execution the testator's goods for the executor's own debt. The application in that case was made by a creditor of the testator, who had lain by for several years after all the other creditors were paid, and then attempted to defeat the execution of a creditor of the executor. [*Lord Chancellor*. Between six and seven years I believe was the lapse of time in *Ray v. Ray*.] The Vice-Chancellor said in that case, "the defendant has the law on his side, and at least

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(a) 17 Ves. 152.

(b) 4 T. R. 621.

(c) Cooper's Ch. Ca. 264.

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an equal equity with the plaintiff, arising from the credit which he has been induced by the plaintiff to give, from being led by the plaintiff to consider the lease to be the executor's own property. I say he has at least an equal equity; and I ask if he has not even a superior equity?"

Mr. *Swanston*, and Mr. *Osborne*, for the respondents. It is conceded on the other side, that the legal ownership of this property was in the administrator; nor was it disputed in the Court below, that the property was trust property. Then, the rule established ever since *Copeman v. Gallant* (a) applies to the present case, namely, that trust property does not pass to the assignees of a bankrupt trustee. [*Lord Chancellor*. Trust property certainly does not pass; but the question is here, whether the bankrupts can be considered as trustees.] There is no authority for saying that an executor *de son tort* is not a trustee. The opinion of the judges of the Court of King's Bench is now cited as deciding a point of law, which was never brought before them for their decision. In that case, there was not such a dealing with the property by the bankrupt as constituted a trust. Here it is expressly stated in the special case, that several of the debts of the intestate were paid by the bankrupts after her death, and that they also paid her funeral expenses. This amounts to a recognition that they were trustees. There is also another important distinction between this case and *Fox v. Fisher* (b), and that is, as to the lapse of time. Here the bankrupts were only in possession of the effects for the space of two years; while in *Fox v. Fisher*, a period of nearly twelve years elapsed during the possession of the bankrupt.

(a) 1 P. Wms. 314.

(b) 3 B. & Ald. 135.



The LORD CHANCELLOR.—I do not think that it makes any essential difference, whether the possession of the bankrupts continued for twelve years, or only two years; for it would equally come within the principle of the case in the King's Bench.

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Mr. Swanston. A period of two or three months, however, it has been conceded by the other side, would give no foundation for the claim of reputed ownership; as it might be reasonably supposed that they were acting for that interval as trustees. But the fact is, that the bankrupt, *James Walker Thomas*, up to the very time of his bankruptcy, continued in possession of the property in a fiduciary capacity. Both the bankrupts first took possession as trustees, and afterwards continued their possession in that character. The present case is very different from *Lingard v. Messiter (a)*, and that class of cases, where it is held that a claim of *secret* ownership shall not prevail against the reputed ownership of the bankrupt. Here the bankrupts took and kept possession of the property, openly, as next of kin, or executors *de law tort*, paying the intestate's debts and funeral expenses; and they were as much trustees of the property, as if they had taken out letters of administration to *Susannah Thomas*, the intestate. The cases cited by the other side relate to disputed claims between the parties themselves; here the controversy is between two classes of creditors, namely, those of the bankrupts, and those of the intestate.

The LORD CHANCELLOR.—The bankrupts here appear to have dealt with the property as their own. Are not

(a) 1 B. &amp; C. 308.

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they therefore wrong-doers, and not trustees? The case appears to me to be very like that in the King's Bench. Any inference of trusteeship is contradicted by their dealing with the property as their own, entering into possession upon it on the death of the intestate, and trading with it on their own account for nearly two years, and then by one of the bankrupts assigning to the other her share in the partnership stock and effects.

Mr. *Swanston*, and Mr. *Osborne*. The bankrupts could not divest themselves of the character of trustees, after having once acquired it. There are several cases where an administrator may be the reputed owner of the property of the intestate, without any title being given to his assignees from that circumstance under the clause of reputed ownership in the Bankrupt Act. For the principle uniformly acted upon is, that trust property does not pass to the assignees.

Mr. *J. Russell* in reply. The question, whether, or not, the bankrupts were trustees of this property, is decided by the statement in the special case, of the way in which they dealt with it. It is no part of the duty of an executor to trade with the property of his testator. In the present case, the bankrupts held themselves out to the world, as the real owners of the property. The notion of a man constituting himself a trustee, in order to take a case out of the operation of the Bankrupt Act, is perfectly unfounded. In order to protect the property from the clause of reputed ownership, a man must be a trustee under a good title. There is no pretence here for treating these bankrupts as trustees; they had merely wrongful possession, without any title.

The LORD CHANCELLOR.—This does not appear to me to be a case of trusteeship at all. Suppose the bankrupts even held themselves out as legal administrators, still they were really nothing but executors *de leur tort*. The daughter first takes possession of the stock and property of the intestate, and continues to carry on the business of the hotel; she then admits her brother as a partner; but neither of them acted, or professed to act, in the character of administrators, or for the benefit of those entitled to a distributive share of the effects of the intestate; they were merely wrong-doers. The payment of some of the intestate's debts was probably only to quiet some importunate claimants, and added nothing to the proof of acting as trustees. From beginning to end, the bankrupts carry on the business in their own names, and for the benefit of themselves alone. The case comes distinctly within the principle laid down by Lord *Tenterden* and Mr. Justice *Bayley*, in *Fox v. Fisher* (a); and, as it is desirable to keep the law uniform, and that case appears to have been well considered, the judgment of the Court below must be reversed; the appellants to have the whole costs of the proceedings below, as well as of this appeal.

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Ex parte HILL.—In the matter of HOLYLAND.

Westminster,  
November 17.  
Coram Lord  
Lyndhurst, C.

MR. DICKINSON moved that a fiat in bankruptcy might be awarded and issued against *Thomas Holyland*,

J. W., in support of a petition for a fiat, deposed that the

alleged bankrupt was indebted to him, J. M. his copartner, (omitting the word "and") for goods sold and delivered by the deponent and his said copartner: *Held*, that the omission rendered the affidavit unavailable for the purpose of striking a docket; and the officer having permitted the docket to be struck, subject to the question of the sufficiency of the above affidavit, and having afterwards permitted a docket to be struck by another creditor,—*Held*, that the latter creditor was entitled to the fiat.

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upon the petition and affidavit of *William Hill*, one of the public officers of the Bank of Manchester, in preference to a fiat on the petition of *John Wood* and *Joseph Milner*.

Docket papers had been taken to the secretary of bankrupts' office on the same day by the solicitor of *Wood* and *Milner*, and by the solicitor of the bank of Manchester. Those of *Wood* and *Milner* arrived first, and the solicitor was told that the affidavit was insufficient, owing to the omission of the word "and," in one passage of the affidavit, the passage in question being as follows, "That *Thomas Holyland* of Manchester, in the county of Lancaster, is justly and truly indebted unto this deponent, *Joseph Milner*, his copartner, in the sum of 50*l.* and upwards, for goods sold and delivered by this deponent and his said partner, to and for the use of the said *Thomas Holyland*."

The solicitor however persisted in striking the docket, which the secretary of bankrupts allowed, stating however that it must be on the responsibility of the solicitor, and subject to the decision of the Lord Chancellor.

A docket was afterwards struck on the petition of *Hill*; but the secretary refused to issue a fiat to either party, until the opinion of the Lord Chancellor was known.

It was now insisted in support of the motion, that the first docket could not under such circumstances be considered to have been struck, when the second docket papers were presented at the office; and that the Manchester bank were the first legal applicants for, and were consequently entitled to the fiat.

Mr. *Swanston*, in opposition to the motion, contended that the latter part of the affidavit, stating that the debt

was due for goods supplied to the deponent and his partner was sufficient. [The *Lord Chancellor*. Would it then be sufficient to omit the first part of the affidavit?] No; but the latter part affords sufficient explanation of the former part.

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Ex parte  
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The LORD CHANCELLOR said, the Court could make no inferences to explain an affidavit; and that as there was no affidavit of debt in support of *Wood* and *Milner's* petition, which could be considered sufficient, or on which an indictment for perjury would lie, the officer could not properly strike the docket, and had not in fact done so, all that took place being expressly subject to the risk arising from the informality of the affidavit. If no docket had subsequently been struck, a fresh affidavit might have been permitted to be sworn; but the party who struck a docket on the same day was entitled to a fiat, unless another docket had been already struck (a).

Ex parte HENRY BYROM.—In the matter of HENRY BYROM.—

*Westminster,*  
*November 19.*  
*and*  
*Lincoln's Inn,*  
*December 12.*

THIS was a petition of the bankrupt, who had obtained his certificate, to expunge a proof that had been made upon a guarantee given by the bankrupt, on the ground that the agreement for the guarantee was not stamped when the proof was made.

A proof will not be ordered to be expunged, merely because the instrument on which the proof was made required a stamp.

Mr. *Calvert* was in support of the petition.

VICE-CHANCELLOR KNIGHT BRUCE C. J.—I cannot say that this instrument requires a stamp, unless I see

(a) See *Ex parte Thorp*, 3 Mont. & A. 395; and *Re Lees*, 3 Deac. 36, S. C., which seem to be overruled by the above case.

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Ex parte  
Byrom.

the act of parliament imposing the stamp. The Court is not bound to know by rote the schedule of the stamp act. I must therefore be furnished with proof, that this particular instrument requires a stamp; and, for that purpose, the case must stand over until I am furnished with the act of parliament.

*Mr. Anderdon, contra.*

*Mr. Calvert*, before the Court rose, having handed up the stamp act to his Honour, submitted, that by expunging the proof the creditor could not again apply to prove, without procuring the proper stamp to be affixed to the instrument; and the assignees would on that occasion be able to enter into all the particulars relating to the guarantee, in order to prevent the proof from being received to the extent to which it was already admitted.

The CHIEF JUDGE.—It seems to me, that to expunge the proof merely for want of a stamp, would be a proceeding perfectly futile; for the creditor has only to apply at the stamp office to have the proper stamp affixed to the instrument, to enable him to prove on it again. If you can furnish me with some evidence, that this debt may be reduced in substance, or that an inquiry is necessary, you may have leave to amend your petition for that purpose. But, as the application now stands, I must decline to interfere.

*December 12.*

His HONOUR mentioned the case again to day, when the counsel for the petitioner having declined to amend the petition, it was

Dismissed, with costs.



Ex parte HENRY BYROM.—In the matter of HENRY  
BYROM.—

1842.

Westminster,  
November 19.

THIS was a petition of the bankrupt against an assignee, charging him with improper conduct, in selling a reversionary life interest of the bankrupt in the sum of 8000*l.* at a lower price than ought to have been obtained for it; and with negligence, in not taking proper steps to recover two debts due to the bankrupt's estate. The petitioner alleged, that the assignee made no attempt whatever to recover a debt due from *Fairclough* and *Wyatt*, in consequence of which the debt was lost, *Fairclough* having become a bankrupt, and *Wyatt* an insolvent. That *Fairclough* and *Wyatt* were in such circumstances at the date of the fiat, 30th December 1839, that if the assignee had proceeded with due diligence, the whole debt, or a great part of it, might have been recovered. And that if proper proceedings had been taken by the assignee against another debtor, named *Peter Leicester*, the sum of 15,000*l.* might have been received for the benefit of the estate.

Inquiry directed, as to the conduct of an assignee in selling a reversionary interest of the bankrupt, and as to his diligence in endeavouring to recover certain debts.

The bankrupt had obtained his certificate, which was dated 17th April 1840.

Mr. *Calvert*, in support of the petition, relied on *Ex parte Dunman* (a), where, on the complaint of a bankrupt that by the mismanagement of his assignees his property had not been realized for his creditors to its fair extent, Lord *Eldon* referred it to the Commissioners to inquire whether the property could have been sold to any, and what greater, advantage.

Mr. *Twiss*, and Mr. *Bartrum*, for the assignee, contended that the petitioner had not shown sufficient

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grounds for an inquiry; and that the utmost received by the assignee under the fiat was 1800*l*. The case cited shews that there was no objection to assignees selling the bankrupt's property by private contract; for Lord *Eldon* expressly says that there is nothing in the statutes to prevent them from doing so, and that that mode of sale may be frequently most advantageous for the creditors. And in *Ex parte Buxton* (a), where a bankrupt's reversionary estate was offered for sale by auction, and 950*l*. bid, and the same was bought in for 1000*l*. upon a reserved bidding to that amount, and afterwards, when reduced into possession, sold for only 510*l*.,—a petition, which under these circumstances sought to fix the assignees, was dismissed.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—It appears to me, that there is enough stated in this petition to call upon the assignee for more assiduous conduct. With regard to the alleged debt of *Fairclough* and *Wyatt*, I am not altogether satisfied of the existence of such a debt; but supposing there to be some debt, I am not satisfied with the reasons given by the assignee for not taking some steps to recover it before *Fairclough's* bankruptcy, and therefore think there ought to be an inquiry whether due diligence was used by the assignee. As to *Leicester's* debt, though the weakest of all the three points urged by the petitioner's counsel, I think that this also should be the subject of inquiry. His Honour then dictated the following

ORDER, that, upon the petitioner giving sufficient security, to the satisfaction of the District Commissioner, for the costs of the inquiry, the Commissioner might inquire whether the reversionary

(a) 1 G. & J. 355.



life interest of the bankrupt in the sum of 8000*l.* could have been sold in a way more beneficial to the estate; and whether the assignee had proceeded with due diligence to obtain payment of the respective debts of *Fairclough* and *Wyatt*, and of *P. Leicester*; that in the course of such inquiry both the bankrupt and the assignee should be examined *vivâ voce* before the Commissioner; and that the Commissioner should be at liberty to state special circumstances; reserving further directions, and costs; with liberty for either party to apply.

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Ex parte JAMES WILSON.—In the matter of THOMAS MANLEY, surviving partner of PHILIP NEWTON, deceased.—

Westminster,  
November 19.

and  
Lincoln's Inn,  
November 30.

THIS was a petition of the inspector of the separate estate of the bankrupt, to expunge two proofs, which had been admitted against that estate, for the respective sums of 967*l.* 6*s.* 10*d.* and 2000*l.*

A. and B., who are partners, and C., as their surety, give a joint and several promissory note to D., by which they "jointly and severally promise to pay" to D. the amount of a partnership debt, due from A. and B. The note is signed by A. and B., not as individuals, but in their

It appeared that the bankrupt, and one *Philip Newton*, in his lifetime, had for some years carried on business in copartnership at Bolton, in Lancashire. In the course of their partnership dealings, they became largely indebted to the bank of Bolton; and at the time of *Philip Newton's* death, which happened on the 17th

partnership firm, and by C. the surety. Held, that this note could not be treated as the several note of each one of the three, but as the several note only of the surety, and the joint note of A. and B.; and that, on the bankruptcy of A., who had survived his partner B., the holder of the note could only rank as a creditor against the joint estate.

A. survives B. his partner, and continues the business in the same firm of "A. and B.;" at the time of B.'s death, a large balance was owing by them to their bankers, to whom A., some time after B.'s death, indorses several bills in the partnership firm of A. and B.; Held, that it could not be inferred from this circumstance alone, that the bills were so indorsed upon a partnership transaction of A. and B., and that the bankers might prove the amount of the bills against the separate estate of A.

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November 1839, a considerable balance was due to the bank, on the partnership account. After *Newton's* death, *Manley* continued to carry on the business as surviving partner, in the same firm of "*Manley and Newton*," and continued also his dealings with the Bolton bank, up to the time of his bankruptcy. An order had been made for keeping distinct accounts of the joint estate of the late partnership, and of the bankrupt's separate estate; and by the same Order, the petitioner was appointed inspector, to protect the interests of the separate creditors. The proof for the above mentioned sum of 967*l.* 6*s.* 10*d.* was founded on seven bills of exchange, which had been paid by *Manley* into the bank, after *Newton's* death; and which, the petitioner contended, were paid in to the credit of the joint account, and in part liquidation of the balance owing to the bank from the bankrupt and his deceased partner. These bills were indorsed by the bankrupt, in the firm of "*Manley and Newton*;" and the petitioner alleged, that they had been received from debtors to the partnership, in payment of their debts, and were paid to the bank in part liquidation of the partnership debt of *Manley and Newton*. The bankers claimed the right to elect, whether they would prove on these bills, as joint creditors of *Manley and Newton*, or as separate creditors of the bankrupt; and the Commissioners admitted them to prove for the amount against the separate estate.

The other proof sought to be expunged was for the sum of 2000*l.*, the amount of a promissory note payable to the bank, which was dated the 5th December 1838, (some time before the death of the bankrupt's partner,) and signed, "*Manley and Newton*," "*Samuel Newton*;" the latter being the bankrupt's father in law, who had signed

the note, as surety for the other two; and the note was in the usual form of a joint and several promissory note. It was contended by the petitioner, that this note could not be treated as the several note of the bankrupt, so as to confer any right of proof against his separate estate; and that it was nothing more than the joint note of the bankrupt and his late partner, given in the lifetime of the latter, as principals, and the separate note of *Samuel Newton*, as surety for them to the bank, for the amount of 2000*l.* on their joint banking account. The Commissioners, however, admitted the bank to prove for this sum, as well as the other, against *Manley's* estate.

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Mr. *Anderdon* was in support of the petition.

Mr. *Piggott*, *contra*, urged, that the seven bills for 967*l.* 6*s.* 10*d.* were negotiated and indorsed by the bankrupt, after the death of *Philip Newton*, and that the bankers had a right to elect, whether they would prove the amount against the joint or separate estate.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. A party, praying to expunge a proof, must either show a sufficient reason for expunging it, or for an inquiry. It appears that in this case *Manley*, after the death of *Newton*, his former partner, carried on business under the same firm of *Manley* and *Newton*. It is not proved, that these bills had reference to any transactions that took place during the partnership. Nothing appears in this case, but that *A.* carries on business under the firm of *A.* and *B.*, after the death of *B.* his partner. How am I to infer from this mere circumstance, that his indorsing bills in the name of *A.* and *B.* was a partnership transaction? These

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observations apply only to the seven bills. As to the other part of the case, the Court will now call upon the respondents.

Mr. *Piggott*, and Mr. *Bigg*, for the respondents. The creditor took this promissory note as the joint and several note of *Manley* and *Newton*, and the separate note of *Samuel Newton*, the surety. In *Edis v. Bury* (a), it was held, that where an instrument is made in terms so ambiguous, as to make it doubtful whether it be a bill of exchange or a promissory note, the holder may at his election, as against the maker of the instrument, treat it as either. So in the present case, we contend, that if there be any doubt whether this note is to be treated as the joint note of *Manley* and *Newton*, or the separate note of *Manley*, the bankers, who are the holders of it, may, as against *Manley*, who signed the note, treat it as joint, or several; and they have accordingly elected to treat it as the separate note of *Manley*, only. If the bankers had brought an action against *Manley* and *Newton*, they might have pleaded in abatement that *Samuel Newton* was not joined. It is the party signing the note, who renders himself individually liable to the holder. Therefore, if a promissory note, beginning "I promise to pay," is signed by one member of a firm for himself and his partner, it has been held, that the party signing is severally liable; *Hall v. Smith* (b). That case shows, that the party who signs the note pledges his separate liability, and may be sued separately. [The Chief Judge. Are *Manley* and *Newton* mentioned in the note as individuals, or are they not rather designated in their partnership capacity?] We submit, that if one

(a) 6 B. &amp; C. 433.

(b) 1 B. &amp; C. 407.

of two partners die, the partnership creditors can, if the survivor becomes bankrupt, prove against his separate estate; and that they are not bound to come only against the joint estate of the deceased and the surviving partner.

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Mr. *Anderdon*, in reply. The proof against the separate estate, in the present instance, is entirely contrary to the Order of the Court of Review in this bankruptcy, as to the marshalling of the assets of the joint and separate estates.

Mr. *F. Bayley*, *amicus Curiae*, referred to *Ex parte Barned (a)*, where it was held that a joint creditor, who sues out a commission against *A.*, "as surviving partner of *B.*," can claim only against the joint estate.

The CHIEF JUDGE asked Mr. *Swanston*, how it was as to the mode of proof allowed to be exercised by a joint creditor of two parties, where one dies, and the other becomes bankrupt.

Mr. *Swanston* said, that the practice of Lord *Eldon* in such a case, was invariably to order distinct accounts to be kept of the joint and separate estates, and he also referred to the above cited case of *Ex parte Barned (a)*.

The CHIEF JUDGE. The question is in this case, whether the deceased partner, *Newton*, was jointly liable on this note with *Manley*, or whether the note is to be treated as the separate note of *Manley*, and of *Samuel Newton*. With respect to the seven bills of exchange,

(a) 1 G. & J. 309.

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it strikes me that the proof is right. As to the other point, I will consider of my judgment.

Lincoln's Inn,
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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The question upon this petition, which was to expunge a proof against the separate estate, arises on a promissory note in these terms;

“We jointly and severally promise to pay to the bank of Bolton on demand, the sum of 2000*l.* for value received.

Manley and Newton,

Samuel Newton.

Two of the parties, whose note it is, are alive; the third, namely *Philip Newton*, one of the partnership firm of *Manley and Newton*, which was composed of himself and the bankrupt, died before the bankruptcy. The Commissioners were of opinion, that, by the effect of the words “joint and several,” there was, in addition to the joint liability of the three, a several liability of each one of the three, but not a joint liability of the two partners, living the three. And, if this had been an ordinary case of a joint and several promissory note by three persons, I should readily have agreed with them. But here, the promissory note having been given to secure a debt due, or to become due, from the partnership of *Manley and Newton*, who were joined in the note by *Samuel Newton*, the other party to it, as their surety, and having been signed by the bankrupt and *Philip Newton*, or by one on behalf of both of them, not as individuals, but in the style merely of their firm, I think it is the true construction of the instrument to say, that it was not the several note of each one of the three, but was the several note of the surety, *Samuel Newton*, and the joint note of the bankrupt and *Philip Newton*. It may also have been the joint note of the three; but

with that we at present have nothing to do. It follows, if I am right, that it is only as the surviving partner of his firm, that the bankrupt became severally indebted upon the note; and the proof therefore must rank, for the purposes of dividend, among the partnership debts, and not among those, which in the lifetime of his partner were merely the separate debts of *Manley*, or which were incurred by *Manley* after the death of *Philip Newton*.

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Ex parte JAMES DILWORTH and JOHN DILWORTH.—In the matter of EDWARD BARNARD HOLLAND.—

Westminster,
November 21.

THIS was the petition of creditors that a dividend already declared might be rescinded, and that they might be permitted to prove under the fiat. At the issuing of the fiat, on the 15th October 1841, the petitioners claimed to be creditors for 761*l.* 16*s.* 5*d.* for goods sold and delivered and money lent. On the 21st December 1841, they proved for only a part of their debt, namely, for the sum of 350*l.*; and the reason they assigned for not proving the remainder was, that they were not then in a situation to do so, in consequence of a bill of exchange having been negotiated by them, and being then outstanding. The petitioners alleged, that they had afterwards taken up this bill, since which there was no meeting for the proof of debts until the 19th September 1842, when a final dividend of 1*s.* 11½*d.* in the pound was declared; and that by some inadvertence no person appeared on behalf of the petitioners to prove for the remainder of their debt, amounting to the sum of 411*l.* 16*s.* 5*d.* On the day after the dividend was declared, the petitioners gave notice

Where a creditor, through inadvertence, omits to prove at the final dividend meeting, the Court will allow him to call a fresh meeting for that purpose, at his own costs, and will rescind the former dividend, so, however, as not to disturb any payments made to the creditors who have already received it.

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*Ex parte*  
*DILWORTH.*

to the assignees of their claim for this further sum, and that, having omitted by mistake to attend the dividend meeting, it was their intention to apply for an order to prove; and they gave them notice not to pay the dividend, until the result of the application was known.

Mr. *Bacon* appeared in support of the petition.

Mr. *Spence, contra*. The omission to prove proceeded from the *laches* of the petitioners, and afforded no ground for the prayer of this petition. In a case of this kind which occurred before Sir *George Rose*, he refused to disturb a former dividend.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—In *Ex parte Day* (a), where a creditor through accident omitted to prove at the meeting for a final dividend, the Lord Chancellor held that he might be permitted to prove, without disturbing any payment made by the assignees, and placing the creditors not paid in the same situation as if he had originally proved. I think I ought to make the same order as in *Ex parte Day*. Let the final dividend therefore be rescinded, and the petitioners be at liberty to call a fresh meeting for the purpose of declaring another dividend; but the petitioners must pay all the costs of this application, and of the meeting; and the payment of the dividend to those creditors, who received it before notice of this application, is not to be disturbed. His Honour then directed the registrar, in drawing up the order, to keep close to that of Lord *Lyndhurst* in *Ex parte Day*, as inserted in the Registrar's Book.

(a) Mont. 212.





Ex parte VARDY.—In the matter of VARDY.

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*MR. BACON* moved that the officer of the Court might be directed to issue out the bankrupt's certificate, in order that it might be inserted in the Gazette. The certificate had been signed by the requisite proportion of creditors and by the Commissioner before the 11th of November, the day on which the statute 5 & 6 Vict. c. 122., came into operation; but a doubt had arisen in the office, whether the certificate under these circumstances would be valid, or whether a new certificate ought not to be obtained under the provisions of the new act, the 37th section of that statute providing that every bankrupt, who shall have conformed in manner therein mentioned, shall be discharged from debts, claims, and demands proveable under the fiat, in case he shall obtain a certificate signed and allowed, and subject to the provisions thereafter mentioned; and that no certificate shall release or discharge him, unless obtained, allowed, and confirmed, according to such provisions, with a proviso that nothing therein contained shall affect the validity of any certificate allowed by the Lord Chancellor or Court of Review, previous to the commencement of the act.

*Westminster,  
November 22.*

Certificate ready for allowance, but not allowed before 5 & 6 Vict. c. 122. came into operation; Held, sufficient under the new act, and allowed accordingly.

The circumstance of this last proviso being confined to certificates which had been actually allowed, occasioned the doubt. The fiat issued on the 9th of September; the bankrupt passed his last examination on the 28th of October; and on the 10th of November the certificate was signed by the Commissioners.

VICE-CHANCELLOR KNIGHT BRUCE, C. J., after reading the act, said he entertained no doubt on the subject, except such as was occasioned by the doubts of others, and made the Order for the certificate to issue.

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Westminster,  
November 23,  
24 and 28,  
and  
Feb. 20, 1843.

A judgment creditor, who, having taken the body of a bankrupt in execution before the bankruptcy, keeps him in prison till he is discharged by his certificate, cannot prove under the bankruptcy.

*Quære:* Whether a final judgment by default, not obtained by collusion, but adversely, which could not have been disputed, if the debtor remained solvent, may be impeached under his bankruptcy, on a proof being tendered upon it.

But if the judgment were obtained under such circumstances as would have been a ground for the interference of a Court of Equity to restrain execution, those circumstances are a sufficient objection to the proof, although the debtor may have omitted to make a legal defence which he had to the action, and although (under such circumstances as those of the present case) nearly twenty years have elapsed since the judgment was obtained.

Ex parte PETER MUDIE.—In the matter of WILLIAM JAMES.

**THIS** was a petition of rehearing. The petition upon the original hearing was dismissed with costs, the only dispute then being as to the facts of the case; except as regarded a short point of practice, with reference to which the case is reported, ante, vol. 2, p. 490.

Upon the dismissal of the original petition, leave was given to file another, to bring the case more fully before the Court, upon payment of the costs of the former proceedings. The present petition was accordingly presented, and it prayed for the admission upon the proceedings of a proof which had been tendered by the petitioner as a judgment creditor.

The judgment was entered up as long since as 1823, and, according to the petitioner's case, under the following circumstances. The father of the bankrupt on his death bed, and when about to make a will, was induced to forbear doing so, upon the faith of a promise made by the bankrupt, who was the eldest son, that he would provide for his sisters, by paying each of them 50*l.* per annum, while single, and a sum of 500*l.* on marriage. One of the sisters was the wife of the petitioner; and in execution of this engagement the bankrupt, as it was alleged, signed and delivered to the petitioner certain bills of exchange in the usual form, except that the consideration was thus expressed:—"For value received in my wife's fortune."

These bills not being paid when due, the petitioner commenced an action in 1822 against the bankrupt upon them, and recovered the judgment now in question, and although (under such circumstances as those of the present case) nearly twenty years have elapsed since the judgment was obtained.

upon which the bankrupt afterwards brought a writ of error; but a *non pros* was signed on April 24th 1823.

The petitioner then caused the bankrupt to be taken in execution upon the judgment, and in June 1823, while he was in prison, the commission of bankrupt issued.

According to the statement in the petition, the petitioner, acting upon the advice of his solicitor, declined to prove his judgment debt under this commission; but afterwards, in 1834, when the bankrupt had obtained his certificate, and had been discharged from prison, the petitioner, having no longer any reason for not proving, applied to prove upon the judgment, whereupon the Commissioners refused to admit the proof.

According however to the evidence produced on behalf of the respondents, the bills of exchange on which the judgment was obtained, were made use of fraudulently, having been blank acceptances delivered by the bankrupt to the petitioner, for the purpose of his getting them discounted, and paying over the money to the bankrupt, and not for the purpose stated by the petitioner.

The objections to the proof were,

First. That the petitioner, by keeping the bankrupt in prison till he obtained his certificate, had, in substance, elected not to come in under the commission.

Secondly. That the judgment had been obtained on bills of exchange, for which no consideration had been given.

Thirdly. That, besides the want of consideration, the bills were given for a specific purpose, and that the action brought upon them was a breach of trust, and a fraud.

In answer to these objections, the petitioner contended, first, that he had not elected, having in fact

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taken the bankrupt in execution before the date of the commission; secondly, that the judgment was conclusive, and could not be questioned; and thirdly, that there was a sufficient consideration for the bills.

The petitioner further contended, that if no consideration was proved, the want of it could not be taken advantage of now, being a good legal defence, if a defence at all, and not having been brought forward at the trial. With respect to the last objection made to his proof, the petitioner, denying the facts stated on the other side, contended also that the objection was substantially the same as the preceding, and amounted to a statement of a want of consideration, which, if it could have been established, would have been a good defence at law.

He contended moreover that it was too late, after so many years, to attempt to set aside an adverse judgment on equitable grounds.

Mr. *Anderdon*, and Mr. *Hallet*, in support of the petition. As to the first point. The petitioner is entitled to prove, unless he has elected not to proceed under the commission. Now, taking the debtor in execution before the commission issued, cannot be an election. *Ex parte Cundell*(a), *Ex parte Knowell*(b), *Ex parte Frith*(c), shew that keeping the bankrupt in custody is not an election, unless when he is taken after the commission has issued. An analogy may be derived from the law as to executions against the goods of a debtor, 21 *Jac.* 1, c. 24, according to which an execution may be had against the goods of a debtor, notwithstanding the body has been taken, if the debtor die in custody. So here, if the body

(a) 6 *Ves.* 446.(c) 1 *Gl. & J.* 165.(b) 13 *Ves.* 193.

is taken out of the custody of the creditor, he must gain a remedy against the property. In *Ex parte Goodman* (a), the bankrupt was taken in execution before the fiat, and the action becoming abated afterwards by the death of the creditor, the executrix of the creditor was admitted to prove. There being no preliminary objection to the proof, the judgment is conclusive; there is no case in which the Commissioners have been permitted to unravel a matter wound up by a judgment in an adverse action; *Assignees of Gardner v. Shannon* (b). *Ex parte Butterfill* (c), which may be cited on the other side, was a case of a verdict not ripened into a judgment, and Lord Eldon there expressly draws the distinction between the two cases. And *Protheroe v. Forman* (d), and *Harrison v. Nettleship* (e), establish that a party, who omitted to make a defence which he had at law, cannot be relieved in equity. If the contract were voluntary in the first instance, a judgment upon it might nevertheless be valid. *Lee v. Muggeridge* (f), *Stiles v. Attorney General* (g), *Blount v. Doughty* (h). But the evidence here shews that the promise was not merely voluntary, but one which might have been enforced; *Drakeford v. Wilks* (i), *Chamberlain v. Agar* (k).

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Mr. Russell, and Mr. Greene, for the assignees. Although there is no reported case upon this exact point as to election, Mr Christian (l) says, "If the bankrupt

(a) Mont. & Ch. 151; 3 Dea. 631.

(b) 2 Sel. & Lef. 228.

(c) 1 Ro. 193.

(d) 2 Swans. 227.

(e) 2 My. & K. 425; and see *Abbey v. Pitch*, 1 Y. & C. N. C. 262.

(f) 5 Taunt. 36.

(g) 2 Atk. 154.

(h) 3 Atk. 484.

(i) 3 Atk. 539.

(k) 2 V. & B. 269.

(l) Bankrupt Law, vol. i. p. 425, 2nd edit.

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is in execution at the suit of the creditor at the issuing of the commission, the creditor need not make his election until there is a dividend; but, if the bankrupt obtain his certificate before that time, I should think the creditor ought not afterwards to be permitted to prove; the debt is then fully discharged, and it was his own fault not to make his election sooner." But the cases are substantially authorities to the same effect, for they do not proceed on any principle exclusively applicable to executions before the commission; *Ex parte Joseph* (a). A man who stands aloof from the commission, and keeps the bankrupt in custody as long as the law allows him, must be said to have elected not to come in under the bankruptcy; and the discharge under the commission can no more give a right of proof to him, than it can to a creditor who has taken the bankrupt in execution after the fiat. Both are deprived of their personal remedy against the debtor by the operation of the certificate; and yet it has never been held that in the latter case, that circumstance entitled the creditor to go in under the fiat. In *Ex parte Goodman* (b) the executrix might have kept the bankrupt in custody, but she elected, as she was entitled to do, before the certificate was granted, to abandon the proceedings at law, and to come in under the bankruptcy. The act in force (c), at the time of these proceedings, provided (as the present act also provides,) that it should not be lawful for any creditor, who had brought any action against the bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved under the commission, to prove a debt under the commission for any purpose whatever, without relinquishing such action and all benefit of the

(a) 1 Ro. 189.

(c) 49 Geo. 3. c. 121. s. 14.

(b) Mont. &amp; C. 151; 3 Deac. 631.

same. But even if the petitioner were not estopped from proving, he has no proveable debt. The argument that the judgment is conclusive, is disposed of by *Ex parte Bryant* (a), and *Ex parte Marston* (b). [*The Chief Judge*. Suppose the case of a litigated demand on which a verdict is obtained and judgment given, must the plaintiff, in the case of a bankruptcy, go through every step over again?] Of course the Commissioner would consider those circumstances in such a case as conclusive, but it is nowhere decided that he cannot inquire into the consideration. Here there is clearly none; a mere moral obligation being now held an insufficient consideration for a subsequent promise; *Eastwood v. Kenyon* (c). But the facts of the case show that there are circumstances which would induce a Court of Equity to interfere; and neither the proceedings at law, nor any other argument adverted to on the other side, can prevent those circumstances from being taken into consideration for the purpose of negating the right to prove.

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*Ex parte*  
*Mudie*.

Mr. *Anderdon*, in reply.

*Cur. adv. vult.*

VICE-CHANCELLOR KNIGHT BRUCE, C. J. In the view which I take of this case, it is not necessary to express, though I entertain, an opinion upon the question raised, as to the petitioner's right to prove, founded upon the execution,—the petitioner's conduct with respect to it,—and the circumstance, that without any election or consent on Mr. *Mudie's* part, the bankrupt was, by reason of having obtained his certificate, discharged

*Lincoln's Inn,*  
*November 28.*

(a) 1 V. & B. 211.

(c) 11 Ad. & El. 450.

(b) 3 M. & A. 444; 3 Dea. 79.

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from imprisonment under the judgment; which is one of the subjects of dispute in the case. Nor is it in my opinion necessary for me to decide, under what circumstances, how far, or in what manner, or whether at all, a final judgment by default, obtained, not by collusion, not voluntarily, but adversely and *in invitum*, against a person who afterwards becomes bankrupt, the judgment being wholly unsatisfied, and being such and so obtained, as that the defendant, if continuing solvent, could not either legally or equitably have disputed it or opened the matter, can be impeached or investigated, when the plaintiff tenders under the bankruptcy a proof founded upon it. As to such a case, I abstain from expressing or intimating any opinion.

The point upon which I decide in the present case, is the equitable invalidity of the judgment.

The evidence before me appears to me to establish, that the bills upon which the judgment was obtained, and which are admitted to be its sole ground and foundation, were accepted by the bankrupt in blank, without consideration, and for a special purpose, namely, for the purpose of being discounted through the assistance of his brother in law, the petitioner, Mr. *Mudie*, in order to raise money for relieving the bankrupt from urgent pecuniary pressure. That these acceptances were, for this special purpose, delivered by the bankrupt to Mr. *Mudie*. That Mr. *Mudie* could not, at least did not, procure them to be discounted. That the purpose, for which alone he received them, was not fulfilled. That continuing in his hands, he consequently held them, in substance and effect, directly as a trustee of them for the bankrupt. That the action brought upon them by Mr. *Mudie* against the bankrupt, was brought, in effect, in



breach of trust. That a Court of Equity, having an application made to it in a proper manner by the bankrupt, and having the facts before it, would have restrained the action, by injunction on equitable grounds. That under such circumstances, the bankrupt, whether able or not able effectually to make, was not bound to make, his defence at law. That consequently the judgment, however final at law, did not bar or preclude the bankrupt from equitable relief against it. That, having regard to his state of embarrassment and distress, and the other circumstances in evidence, such a length of time had not at the time of his bankruptcy elapsed since the judgment had become final at law, as to preclude his equitable title to relief; and that therefore the jurisdiction in bankruptcy, being equitable as well as legal, is bound to reject any proof tendered on the foundation of such a judgment.

What I have said of the judgment disposes as far as my opinion is concerned of the bills. It is said, however, that independently of the bills, and independently of the judgment, there is a right of proof, founded on an alleged promise on the part of the bankrupt to pay Mrs. *Mudie* 500*l.* upon her marriage. The reference made in the body of the bills, in the handwriting of Mr. *Mudie*, (who in the bankrupt's absence filled up the bills) to her fortune, I pass over. That is a circumstance, by which if any party or interest is prejudiced, that party or interest is not the bankrupt, or the bankrupt's estate. Upon the evidence, I am of opinion, that the bankrupt never intended the bills to have the least bearing upon that alleged promise or fortune, or the least reference to any such matter; and that it is not established, that the bankrupt ever came under any binding contract, or

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enforceable obligation to pay that or any other sum to Mrs. *Mudie*, on her marriage, or otherwise.

I must therefore dismiss the petition; and having regard to what has already taken place before the Court of Review, to the length of time that has elapsed since the bankruptcy, and to the other circumstances, I consider myself bound to dismiss it with costs.

By doing so, however, I do not mean to decide, that at the bankruptcy Mr. *Mudie* was not in any shape a creditor of the bankrupt. It is possible, that the bankrupt may then have been a debtor to him for some pecuniary advance. The dismissal, therefore, will be without prejudice to the right, if any, of Mr. *Mudie* to prove the debt, if any, due to him from the bankrupt at the time of the bankruptcy, in respect of any pecuniary advance made to him, or on his account, by Mr. *Mudie*.

No such proof has yet been tendered, no such case has hitherto been made.

1843.

February 20.  
Coram  
The Chief Judge  
and Sir G. Rose.

The petition having been accordingly dismissed with costs, the petitioner applied for another hearing, and this day having been appointed for that purpose,

The *petitioner* appeared in person, in support of his petition, and in the course of his address applied to see the documents and papers in the possession of the assignees.

Mr. *Russell, contrà*. The proceedings are in Court, and all the other documents we have will be here in five minutes.

SIR GEORGE ROSE. Assuming the petitioner's debt on the judgment to have been a good and proveable debt

at the time of the commission issuing, now nearly twenty years ago, (and to establish this fact, is the only use he can make of the documents, if he had had them produced as he wished,) the question still arises, whether under the circumstances of this case, and particularly having regard to the conduct of the petitioner, and the lapse of time, he can now be at liberty to prove as against the bankrupt's just creditors. There is no doubt that the rule of this Court, in regard to execution on a judgment, is, that if the execution be sued out *after* the bankruptcy, it is an election on the part of the creditor to rely on his legal remedy, and not to seek relief under the commission or fiat; but if the execution be sued out *before* the bankruptcy, then a reasonable time must be allowed the creditor to make his election. It is a most important principle of the bankrupt laws, that the bankrupt should conform in all things to the jurisdiction of the Commissioners, attend them personally whenever required, make full disclosure of his affairs, and assist the assignees in every way that is needful to make his estate available for his creditors, and pass his examination in due course, and upon his doing so, that he shall be entitled to his personal liberty. But a creditor who insists on detaining his debtor, the bankrupt, in execution, necessarily impedes the bankrupt in these duties under the commission or fiat, and if he continues this impediment to the bankrupt's free agency under the commission or fiat, as long as the law will permit, that is down to the time the certificate operates to discharge him, how can it be contended that he does not elect to have the benefit of his execution, instead of relief under the commission or fiat? Not only has this petitioner so acted, but from the time of such discharge by the certificate in 1823, he has never offered a proof till the year 1839, after the bank-

1842.

Ex parte  
Muniz.

1842.

Ex parte  
MUDIE.

rupt's death ; and this delay strengthens the conclusion in my mind that the election was made. But this is not all ; I find on the face of the petition itself, a clear election stated. The petitioner alleges, that, after the bankruptcy, he *declined* to go in and prove under the commission, on the advice of his then solicitor, Mr. *Henry Hill* ; and a little farther on, that in the year 1834, after the certificate was granted, having *no longer any reason for not proving*, he applied to prove. I cannot conceive a more deliberate election than this. The creditor elects to have all that the law will give him under his execution, and now contends he is also entitled to have the benefit of that commission to which he has all along been acting in opposition. For these reasons, without going further into the consideration of the judgment debt, and for the sake of the argument, admitting it to be a good debt in its origin, on which I give no opinion, the present petition must be dismissed with costs.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. After the able judgment now delivered by his Honour Sir *George Rose*,—as to the grounds of which, neither on this occasion do I, nor on the former occasion did I, express any dissent,—it is unnecessary for me to consider this case further. To remove the effect of my former judgment, it is necessary, as the Court is on this day constituted, that both judges should concur. This petition must be dismissed with costs ; but the assignees consenting, and with the concurrence of the Court, let the assignees be at liberty to take their costs out of the estate, and not take any proceedings against the petitioner for their costs, unless he present another petition.

1842.



Westminster,  
November 22.

*Ex parte* GORE.—In the matter of STEVENS.

THIS was the petition of one of the assignees, stating that the purchaser of part of the bankrupt's effects at a sale under the fiat, was in fact an agent for the petitioner, and praying that the sale might nevertheless be ordered to be carried into effect; or, if the Court should think proper, that the property might be put up again for sale by public auction and resold, the petitioner offering to complete his purchase after such auction, in case no advance was procured upon his bidding, and offering to pay all the costs of such proceedings.

Form of Order, upon the petition of an assignee, who had in the name of an agent bid at a sale for a portion of the bankrupt's property, and then prayed to have the sale completed, or the property resold.

*Semble*, the Court of Review has jurisdiction to direct references to the Commissioners.

Mr. *Weld*, in support of the petition, cited *Ex parte Hughes (a)*, *Ex parte Lacey (b)*, *Ex parte Hewitt (c)*.

Mr. *Russell*, and Mr. *E. Webster*, for the co-assignees, submitted to the Order of the Court, but denied all participation in or knowledge of the transaction, on the part of their clients.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. This is a case of a concealed purchase by one of the acting assignees in the name of a stranger, a case to which the Court cannot have its attention called, without dealing with it gravely and seriously, not only for the sake of the parties concerned, but with regard to the interest of the public in general. The only Order which I can at present make, will be to refer it to the Commissioner, to inquire and state whether it will be for the interest and

(a) 6 Ves. 617.

(c) 2 M. & A. 447.

(b) 6 Ves. 625.

1842.

Ex parte  
Gore.

benefit of the estate, to adopt the sale to *Gore* and *Roberts* or either and which of them, and also whether it will be for the interest and benefit of the estate, that the two lots, or either and which of them, should be offered for sale again in any and what manner, on the principle of holding the petitioner, or his agent, to the purchase of the lot or lots, if a greater price should not be obtained. And the Commissioner must inquire and state, whether the estate of the bankrupt has sustained any and what loss or damage, by reason or in consequence of the purchase of the two lots, or either and which of them, in the name of the petitioner, and his agent, or either and which of them; and must also state what course in his opinion it will be most for the benefit of the estate to take, with regard to the two lots respectively. He must also inquire and state when first the petitioner's co-assignee knew, or had reason to believe or suspect, that the petitioner was the real purchaser; and the Commissioner must be at liberty to proceed *de die in diem*. Reserve the question whether the petitioner ought to be continued as assignee, with liberty to state special circumstances; reserve all costs, including those of the proceedings under this Order, with liberty to apply.

It was suggested to the Court, that a difficulty had arisen in a former case, upon a reference being directed by the Court of Review to one of the London Commissioners, who was of opinion that that Court had not jurisdiction to make such a reference, and *Ex parte Rolfe* (a) was referred to; but his Honour, after reading the report of that case, and the act of 1 & 2 Will. 4. c. 56. s. 2., said he did not at present entertain any doubt of the

(a) 3 M. & A. 316; 2 Deac. 436.

jurisdiction of the Court of Review to direct such a reference, but that if any difficulty arose in the prosecution of the reference, he should be glad to confer with the learned Commissioner on the subject.

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Ex parte  
Goss.

Ex parte CHEESE.—In the matter of CHEESE.

Lincoln's Inn,  
Nov. 26.

*MR. TRIPP* moved that an affidavit might be taken off the file, which had been placed there, with a view to found proceedings upon it under 1 & 2 Vict. c. 110. s. 8. He contended, that the recent enactment 5 & 6 Vict. c. 122. s. 11., was inconsistent with the 8th section of the 1 & 2 Vict. c. 110., and therefore repealed it.

The Court refused to order an affidavit filed under 1 & 2 Vict. c. 110., to be taken off the file; on the ground that no fiat could issue upon it.

*Mr. Bacon*, in opposition to the motion, cited *Ex parte Rose (a)*, and *Ex parte Ferreday (b)*.

*Mr. Tripp* in reply.

The CHIEF JUDGE did not understand the new enactment, as repealing the former; but thought it unnecessary to decide the point, as the objection, taken at the highest, was merely that the affidavit was useless, and could not support any fiat. A stranger could not have an affidavit taken off the file, for impertinence merely; and it might be doubtful, whether taking the affidavit off the file would affect any proceedings founded upon it, it having been once filed, according to the requisitions of the act of parliament.

Motion refused.

(a) 4 Deac. 66.

(b) 1 M. D. & D. 172.

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Ex parte

CHESAS.

December 7.

The motion was this day made again by way of appeal to the Lord Chancellor, who concurred in the view taken by the Court of Review, and refused the application.

Mr. *Swanston*, and Mr. *Tripp*, in support of the motion.

Mr. *Bacon*, *contra*.

*Lincoln's Inn*,  
Nov. 29 & 30,  
and  
December 6.

Ex parte WILLIAM RIDDELL and others.—In the matter of WILLIAM SMITH BATSON, JOHN WILSON, and JOHN LANGHORNE.

The treasurer of a Savings Bank, on his appointment, enters into the usual bond for performance of his duties, but does not receive any money, the deposits being paid by the managers directly to a banking firm, of which the treasurer is a partner, to the credit of the trustees of the Savings Bank, who are allowed interest upon it. But he nevertheless signs the return (required by the act) to the Commissioners for the reduction of the National Debt, and thereby acknowledges the amount of the balance, standing to the credit of the trustees, to be monies in his hands as treasurer. The firm become bankrupt. Held, that the balance was in the hands of the treasurer, as treasurer, at his bankruptcy, and might be recovered in full by the Savings Bank.

THE petitioners were the trustees of the Berwick and Tweedmouth Savings Bank, of which the bankrupt *Langhorne* was the treasurer, and they sought payment in full out of the separate estate of the bankrupt *Langhorne*, of a sum which they alleged to be due from him, as treasurer of the Savings Bank, at the time of his bankruptcy.

The bank, which was established in 1816, before the statutes 9 Geo. 4. c. 92. and 3 & 4 Will. 4. c. 14., passed, was, after the passing of those enactments, carried on in conformity with their provisions (a).

(a) The following were the clauses relied upon in the argument and judgment.

9 Geo. 4, c. 92, sect. 7. " Every treasurer, actuary, or cashier, who shall be intrusted with the receipt or custody of any sum of money, subscribed or deposited for the purpose of such institution, or any interest or dividend

and thereby acknowledges the amount of the balance, standing to the credit of the trustees, to be monies in his hands as treasurer. The firm become bankrupt. Held, that the balance was in the hands of the treasurer, as treasurer, at his bankruptcy, and might be recovered in full by the Savings Bank.



By the second rule of the bank, it was provided that no person being a manager, trustee, or treasurer, or

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and others.

from time to time accruing therefrom, and every officer, or other person, receiving any salary or allowance for their services from the funds of any Savings Banks, unless he shall already have given good and sufficient security, shall give good and sufficient security, to be approved of by not less than two trustees and three managers of such Savings Banks, for the just and faithful execution of such office or trust."

Sect. 8. "All monies, goods, chattels and effects whatever, and all securities for money, or other obligatory instruments and evidences, or securities, and all other effects whatever, and all rights or claims belonging to or had by such institution, shall be vested in the trustees or trustee of such institution for the time being, for the use and benefit of such institution."

Sect. 10. "All and every person and persons who shall have or receive any part of the monies, effects, or funds of or belonging to such institution, or shall in any manner have been, or shall be intrusted with the disposition, management, or custody thereof, or of any securities, books, or papers, or property relating to the same, his, her, or their executors, administrators, and assigns respectively, shall, upon demand made in pursuance of any order of not less than two trustees and three managers of such institution, or at any general meeting of the trustees or managers thereof, give in his, her, or their account or accounts to the said trustees or managers, or to such general meeting of such institution, or to such other person or persons who shall be nominated to receive the same, to be examined and allowed or disallowed by the said trustees or managers respectively, and shall on the like demand pay over all the monies remaining in his or their hands, and assign and transfer, or deliver all securities and effects, books, papers, and property in his or their hands or custody, to such person or persons as the said trustees or managers shall appoint."

Sect. 46. "The trustees or managers of any Savings Bank shall annually cause a general statement of the funds of such Savings Bank, invested in the Bank of England or in the Bank of Ireland in the names of the Commissioners for the Reduction of the National Debt, to be prepared up to the 20th day of November, showing the balance or principal sum due to all the depositors collectively in such Savings Bank, and a statement of the expenses incurred, and stating in whose hands such balance shall then be remaining, and every such annual statement shall be attested by two managers, or two trustees, or by one manager and one trustee of such Savings Bank, and every such annual statement shall be countersigned by the secretary or actuary of such Savings Bank, and all such annual statements shall be transmitted to the Office of the said Commissioners for the Reduction of the National Debt in London or Dublin, as the case may be, within six weeks next after the 20th day of November in each year, and in case the trustees

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having any control in the management of the institution, should derive any benefit from any deposit made in the

of any such Savings Bank shall neglect or refuse to make out and transmit such account as aforesaid, or in case any such trustees shall at any time neglect or refuse to obey any orders or directions given by the said Commissioners, or through their officer, pursuant to the directions of this act, it shall and may be lawful for the said Commissioners to close the account of the trustees of such Savings Bank, and to discontinue the keeping of any further account with the trustees of such Savings Bank, and to direct that no further sum shall be received at the Bank of England, or at the Bank of Ireland, from the trustees of such Savings Bank to the account of the said Commissioners, until such times as such Commissioners shall think fit: Provided always, that it may be lawful for the said Commissioners to re-open such account, and to allow the growing interest of such account during the time of such discontinuance, and to authorize the receipt of money at the Bank of England or Ireland, whenever such Commissioners shall think fit to do so."

Sect. 47. "The trustees or managers of every such Savings Bank shall cause a duplicate of every such annual statement, accompanied by a list of the trustees and managers of such institution, for the time being, attested and countersigned as aforesaid, to be publicly affixed and exhibited in some conspicuous part of the office or place, where the deposits of such Savings Bank are usually received, for the information of all persons making deposits therein, and every such duplicate shall from time to time remain so affixed and exhibited, until the ensuing annual statement shall in like manner be affixed and exhibited as aforesaid; and every depositor shall be entitled to receive from the said institution a printed copy of such annual statement, on payment of one penny."

The 28th section of 3 & 4 Will. 4. c. 14., provides, that if any person, already appointed under the provisions of the act of the 9 Geo. 4., or who might thereafter be appointed to any office in a Savings Bank, or in a Society established under this act, and being entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any monies or effects belonging to such Savings Bank or Society, or any deeds or securities relating to the same, shall die or become a bankrupt, or be placed in certain other described situations, "his executors, administrators or assignees, or other persons having legal right, or the sheriff or other officer executing such process, shall within forty days after demand made by two of the trustees of the said Savings Bank or Society as aforesaid, deliver and pay over all monies and other things belonging to such Savings Bank or Society to such person as the said trustees shall appoint, and shall pay out of the estates, assets, or effects of such person, all sums of money remaining due, which such person received by virtue of his said office or

bank, or receive any emolument, allowance, or salary directly or indirectly, beyond his actual expenses for the purposes of the institution.

The 4th rule provided, that the trustees should have the superintendence of the manner in which the several other office bearers execute their duties, and in particular should see that the investments both as to time and amount were properly made, the accounts regularly prepared and audited, the annual statements duly made out and transmitted, and the stated meetings called, and that they should have power to call a special meeting when they should deem it necessary. Another rule provided, that whenever the balance in the treasurer's hands should exceed 300*l.*, so much of the amount above 200*l.* as the trustees should direct, should be forthwith invested in the Bank of England, in the manner prescribed by the act of parliament.

Before the appointment of *Langhorne* as treasurer, the then trustees and managers of the Savings Bank had an account with Messrs. *Batson, Reeds, Berry & Co.*, who carried on business as bankers at Berwick upon Tweed, and the account was entitled "Berwick and Tweedmouth Savings Bank." Afterwards, in 1818, the bankrupt *Langhorne* became a partner in the banking firm, and was subsequently appointed to the office of treasurer of the Savings Bank, entering upon that occasion with one Mr. *Wilson*, as a surety, into a bond as required by the act, whereby

employment, before any other of his said debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid is paid over to the party issuing such process."

The 32nd section provides, "That whenever it shall appear in any annual statement, that any sum of money of or belonging to a Savings Bank is in the hands of any treasurer or other person, the said annual statement shall be accompanied with a certificate, signed by such treasurer or other person, that the sum of money therein mentioned is in his possession."

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they bound themselves to the town clerk of Berwick upon Tweed in the sum of 1000*l.*, conditioned to be void, if *Langhorne* should during his continuance as treasurer to the Savings Bank faithfully, honestly, diligently, and carefully execute, perform, and discharge the service or office, according to the rules and regulations of the Savings Bank, and also if *Langhorne*, or his executors, administrators, and assigns, should, upon demand made in pursuance of any order of not less than two trustees and three managers of the Savings Bank, or at a general meeting of the trustees or managers, give in his or their account or accounts to be examined and allowed, or disallowed, by the trustees and managers, and should on the like demand pay over all the monies in his or their hands, and assign, or transfer and deliver all securities and effects, books, papers and property in his or their hands or custody, to such person or persons as the trustees or managers should appoint.

No alteration took place, on the appointment of *Langhorne*, in the title of the account between the banking company and the Savings Bank. A pass book was from time to time made out, and delivered by the bankers to the trustees and managers of the Savings Bank, in the same way as to the other customers of the bank, the account in the pass book being entitled "Berwick and Tweedmouth Savings Bank in account current with Messrs. *Batson, Berry, & Co.*"

The meetings of the Savings Bank were held on Monday evening in every week, at an hour later than that at which the bank closed for the day. The bankrupt *Langhorne* did not attend those meetings, nor was the balance of cash remaining in the hands of the clerks or managers of the Savings Bank brought to him as

treasurer, but was paid on the following day by the managers or clerk who had been present at the meeting, into the bank of *Batson & Co.*, to the credit of the Savings Bank account, the pass book being brought on such occasion to the bank, and returned to the person bringing it after the payment had been entered up. It was the custom of the bankers to allow interest upon the deposits in their bank, and the customary allowance was made to the Savings Bank upon the balances in their favour.

The bankrupt *Langhorne* deposed, that he never drew any cheques upon *Batson & Co.*, nor in any manner interfered with the account of the Savings Bank with them, and that no payments were made thereout, except in pursuance of cheques drawn by the managers, or of the orders for payment of the surplus monies of the Savings Bank into the Bank of England, in the names of the Commissioners for the Reduction of the National Debt, according to the provisions of the statute. These orders were signed by two of the trustees, and were delivered to the bankers, who thereupon directed their own London agents, being also the agents of the Savings Bank, to make such payments accordingly.

It appeared, however, that the bankrupt *Langhorne* had been in the habit of signing a monthly return made to the Commissioners for the Reduction of the National Debt, of the sums of money received and paid at the office of the Savings Bank. This return was in columns containing the balance in hand at the commencement of each day of meeting, the sums received of and paid to the depositors at that meeting, and the balance at the close of the day. The last column contained a statement of how the balance had been disposed of, and this column contained entries for each day in the following form,

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“Remaining in my hands £

T. Langhorne, Treasurer.

The last of these entries was an acknowledgment of a sum of 1110*l.* 19*s.* 9*d.*, and was dated the 29th of November 1841.

With reference to this part of the case, the bankrupt *Langhorne* deposed, that for some years past, the clerk or actuary of the Savings Bank had been in the habit of bringing to him the monthly return required by the statute, and that he, as a matter of form, signed the certificate required to be made by the treasurer, but that the money, which he thereby stated to remain in his hands, was not in fact in his hands, or under his control, otherwise than as a partner in the bank. That the last of such certificates was signed by him after he had committed an act of bankruptcy, and that he had not at the time of signing it the sum in his hands which he there acknowledged.

Mr. *Swanston*, and Mr. *Hardy*, for the petition. The acknowledgment by the treasurer of the sums remaining in his hands is sufficient to charge him, and the circumstance that the money was paid for his convenience at once into a bank in which he was a partner, instead of his having the trouble of making the deposit, cannot alter the effect of this acknowledgment. If he were not to be liable, to what purpose would it have been to take a bond from him with a surety?

Mr. *Russell*, and Mr. *Bacon*, for the assignees. The acknowledgment is merely *prima facie* evidence, which is of no importance here, since there is no dispute as to the facts. To come within the benefit of the clause in the act of parliament, the requisite facts must exist; an

acknowledgment by any body that they exist, if they do not, will not satisfy the enactment, which, being against the general principle of the bankrupt laws, that of equal distribution, must be construed strictly. How strongly the Court leans against such exceptions out of the general rule, appears from the numerous cases on the similar provision with respect to friendly societies; *Ex parte Ashley*(a), *Ex parte Corser*(b), *Ex parte Ross*(c), *Amicable Society of Lancaster*(d), *Ex parte Stamford Friendly Society*(e). Here it is clear that there was no money of the society in the hands of the treasurer. By the act of parliament, the trustees were authorized to appoint a treasurer; but they were not obliged to entrust him with the monies of the society, unless they thought proper. And they did not here so entrust him; he never had control over the money; it was paid to the account of the trustees; and the treasurer could never have touched one shilling of it,

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The question to be decided is, whether the cash balance, which at the time of the bankruptcy was belonging or due to the Savings Bank represented by the petitioners, ought, under the circumstances appearing in evidence, to be treated as money then in the hands or possession of the bankrupt *John Langhorne*, by virtue of his office or employment of treasurer of that institution, which he had received by virtue of that office or employment.

December 6.

The respondents, the assignees of the bankrupts, say, that the cash balance was due at the bankruptcy from the

(a) 6 Ves. 441.

(c) 6 Ves. 802.

(b) Ibid.

(d) 6 Ves. 98.

(e) 15 Ves. 280; and see *Ex parte Buckland*, Buck, 214; and *In the matter of the Heanor Friendly Society*, 1 Bea. 511.

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three bankrupts jointly, and not otherwise; and admitting, as the respondents do, that Mr. *Langhorne* was the treasurer of the Savings Bank, and, as such, an officer within the meaning of the stat. 3 & 4 *Will.* 4. c. 14. s. 28., they deny that the cash balance, or any part of it, had been received by him, by virtue of his office or employment, or was money in his hands or possession, by virtue of his office or employment. The petitioners allege the contrary, claiming, as to the whole balance, the benefit of that section; but, as I understand their case, neither admitting nor denying, that in addition to this benefit they have a right of proof against the joint estate of the three. And upon the last point I wish to say at the outset, that there seems to me not to be any necessity or occasion for deciding or expressing any opinion upon it.

The only statutes to which I have referred, are that which I have mentioned, and that of 9 *Geo.* 4. c. 92. The sections of the statute 9 *Geo.* 4. c. 92., material to the present purpose, seem to be the 7th, 8th, 10th, 46th, 47th, and those of the 3rd and 4th *Will.* 4. c. 14. are the 28th, and the 32nd. (His Honour read them.)

The course which seems to have been pursued in the present case, as well before as after the stat. 9 *Geo.* 4. c. 92., and probably as well before as after the periods, (each, as it seems, more than 20 years before the bankruptcy,)—when Mr. *Langhorne* became the treasurer of this institution, and a partner in the banking establishment with which it banked, was, after Mr. *Langhorne* was appointed to the office of treasurer, certainly not very regular. He appears not to have been appointed treasurer, until after he had become a partner in the banking house. The only account between the institution and the banking house that has ever existed, seems to have



been kept in the books of the banking house in the names of the trustees of the institution. They seem from time to time to have drawn upon it in the manner usual between bankers and their customers, without any intervention on the part of the treasurer, who, from the year 1820 at least, was an active member of the banking establishment, but who is alleged not to have received, unless in that way, any of the money of the institution, or to have paid any money on its behalf.

In effect, the office, according to the respondent's construction, was, in the hands of Mr. *Langhorne*, a sinecure or dead letter. This, however, the bond of 1834 seems to shew that none of the parties at that time could have supposed or contemplated; and a necessary consequence of the respondent's argument seems to be, not only that the 28th section of the 3 & 4 *Will.* 4. c. 14., has in this case nothing upon which to operate, but that the institution may not have the right of a separate creditor of Mr. *Langhorne* against his separate estate, and has not the right of a separate creditor of Mr. *Wilson* the surety against his separate estate; except as there might possibly have been a breach of the bond of 1834, (which was I suppose joint and several), by reason of Mr. *Langhorne* not having executed, performed or discharged, if he did not execute, perform and discharge, the office faithfully, honestly, diligently, and carefully, according to the rules and regulations of the institution. I may observe in passing, that, if before the bankruptcy there was a breach of the bond in that way, and the separate estate either of Mr. *Langhorne* or Mr. *Wilson* is solvent, the value of the present contention may not be considerable.

It is not certainly, in the absence of evidence, to be presumed that the trustees or treasurer would have acted

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in the manner the respondents allege ; the presumption, in the absence of proof to the contrary, ought to be, that the trustees or treasurer acted regularly and in conformity with their duties, and with their own representations of their conduct and proceedings; I say "their own representations;" for it is in evidence, that what the trustees and treasurer continually and uniformly before the bankruptcy, and in truth during a long and unbroken series of years ending with the bankruptcy, represented to the commissioners for the reduction of the national debt, and in effect to the public, was, that the last balance of the institution for the time being was in the hands of the treasurer in that capacity, and therefore in a position to be protected by the 28th section, and clearly by the bond.

The respondents contend, that these representations were fallacious. Can I under these circumstances hear them say so effectually? I am disposed not only to give effect to those representations, but to believe them to have been honestly made. Upon the whole of the evidence, without straining too much in favour of construing the acts of men in a manner not at variance with their duty, or in favour of the general rule of presumption, that men act rightly rather than improperly, I am of opinion, that all parties ought to be held to have understood the account with the banking house, for every purpose of charging him and his surety, of protecting the trustees and depositors, and of obeying the law, as "the treasurer's account." I mean in this sense, that,—instead of paying the money of the institution to him directly, or to his account at the banking house, and then issuing orders to him by the trustees as they required money to be paid, he drawing on the banking house for the amount desired,—the same thing in sub-

stance was intended to be done by the less circuitous course of paying money into the banking house in which the treasurer was an active partner, to the account of the trustees, as was probably done before he was treasurer, and before he was a partner, the trustees drawing directly upon the banking house. If, in reality, this was, as I think it was, understood and intended by all parties after the appointment of Mr. *Langhorne* to the treasurer-ship, as being equivalent to and in effect the same, with the larger, more formal and regular mode to which I have referred, and the course of paying and receiving, and drawing and answering checks, was not without reference to the office of treasurer, nor otherwise than upon the footing of regarding and performing its functions and duties,—Mr. *Langhorne* himself being an active member of the banking house,—I think that the form of the accounts and transactions did not, and would not, make any difference.

If the representations to which I have referred had been merely fictitious and wholly unfounded,—if Mr. *Langhorne* had not in any way jointly with his partners or otherwise, received the money, those representations, whether sufficient, or not sufficient, to charge him separately, would have had the effect of giving the trustees the benefit of the 28th section against his general creditors.

It is unnecessary to decide, and I do not either assert or deny, that the banking firm was, or was not, also jointly liable to the trustees; for, in my view of the whole evidence, the true result is, that substantially, for every material purpose, he received the money in question as treasurer, and in that character owed it at the time of his bankruptcy. The argument upon the allowance of interest does not weigh with me. Had the account been

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in the name of the treasurer in the most formal manner, there would have been nothing in the ordinary circumstances of the bankers, being country bankers, allowing interest, and it makes no difference I conceive in the existing case.

It is probably unnecessary, but it is right to add, that I consider this decision in favour of the petitioner's title to the benefit of the 28th section, as entirely consistent with the cases in the 6th Vesey, and the *Stamford Society Case (a)* cited at the bar, and also with *Ex parte Buckland (b)*.

On the whole, I think the assignees did not act improperly in declining to accede to this claim, unsustained as it was; and I think it right in such a case as this to give them their costs, not out of their estate, but, there being as I understand no settled rule of practice with regard to costs in a case of this description, out of the funds in dispute, allowing them however the costs of only two of the affidavits that have been filed. There are persons among those who are parties to this petition, whom I consider bound to indemnify the fund from this deduction, occasioned as the dispute has been by the irregular mode in which the trustees for the time being allowed the business to be conducted; for that reason I give the petitioners no costs, and declare that those costs are not to be deducted or retained out of the fund. It may be, that among them are persons who did not participate; but I understand them as including persons, who did, though I dare say, and do not doubt, without any improper motive, participate in their regularity.

The amount of the cash balance must be ascertained by inquiry, if the parties differ; I do not consider it as

(a) 15 Ves. 280.

(b) Buck, 214.

including any amount not actually credited at the time of the bankruptcy. For that reason, and from the deduction in respect of the assignees, there may yet remain a right of proof for the petitioners. I leave such right, if any, unprejudiced.

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In the matter of TOPLING.

*MR. ROGERS* moved on behalf of the petitioners, who resided in Scotland, that the petition might be received with the signature of their London agent only.

*Lincoln's Inn,  
November 30.*

Signature of the London agent of petitioners residing in Scotland declared to be sufficient, on the agent undertaking to be answerable for costs.

The Court made the Order, on the agent undertaking to be answerable for the costs.

Ex parte LEWIS.—In the matter of WILLIAM WOOD.

**THIS** was the petition of a creditor of the bankrupt to annul the fiat, on the ground, among others, of insufficient description of the bankrupt, who was therein described as “late of Pickett Street Chambers, Strand, Bill Broker and Money Scrivener, Dealer and Chapman.”

*Lincoln's Inn,  
December 7.*

Description of the bankrupt, as late of a place at which he carried on business a year before the issuing of the fiat, he having carried on business since elsewhere, held insufficient, and the fiat annulled. To annul a fiat for insufficient description, it is not necessary that the existence of actual fraud or mis-chief should be shown.

The fiat issued in July 1842; and it appeared that the bankrupt had occupied chambers in Pickett Street, Strand, from the year 1832 until the year 1841; that he also resided in the Fulham Road from the year 1836 until May 1841, and at both of these places had carried on the profession of an attorney and solicitor, and also, as was alleged in support of the fiat, the business of a bill broker and money scrivener. In May 1841, he quitted his residence

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in the Fulham Road, and went to reside in the Albany Road, in the county of Surrey; and in the month of July 1841, he also quitted his chambers in Pickett Street, and removed to New Clement's Inn Chambers.

On the 17th December 1841, the bankrupt had taken out his certificate to practise as a solicitor, and was therein described as of New Clement's Inn Chambers, Strand.

The bankrupt continued to reside in the Albany Road, from the time of his removal from the Fulham Road, until after the date of the fiat.

Mr. *Kenyon Parker*, and Mr. *S. James*, in support of the petition, cited *Ex parte Day* (a).

Mr. *Anderdon*, and Mr. *Dixon*, *contra*. The Court will not annul for slight imperfections of description, by which no creditor is misled; *Ex parte Mills* (b). The misdescription must be with intent to deceive, or it must be such as necessarily would mislead the creditors. Here the petitioner does not allege that any creditor was misled.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. It appears that the bankrupt resided in the Fulham Road and the Albany Road, and contracted debts there in 1841 and 1842, and that he left his chambers in Pickett Street in July 1841, and never had any chambers there afterwards, but removed to New Clement's Inn Chambers; and yet the fiat takes no notice of the residence in the Fulham Road, or Albany Road, or of the New Inn Chambers, but simply describes the bankrupt, as late of Pickett Street Chambers.

(a) *Mont. & M'A.* 208.

(b) 1 *M. & A.* 310; 3 *Dea. & Ch.* 606.

Now that I think is not sufficient. I think the petitioner has a right to complain of the description, without showing any case of actual fraud, or any mischief actually sustained. The fiat must be annulled at the costs of the petitioning creditor.

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Ex parte JOHN FIELD, and JOHN FIELD the Younger.—

In the matter of SPENCER ROGERS.

*Lincoln's Inn,  
December 7 & 12.*

IN this case the Commissioners had rejected a proof tendered by the petitioners, on the ground that the debt, in respect of which it was sought to be made, was due from the bankrupt, not alone, but jointly with two other persons as his partners, one of whom was still solvent. The petitioners now appealed against this decision; and it appeared that they were stockbrokers, who had purchased at the request and on the joint account of the bankrupt, and two other persons named *Johnson* and *Greenwell*, twenty shares in the Manchester and Leeds Railway, to be delivered and paid for on the 11th of February 1841. On that day however, the purchasers not being prepared to accept and pay for the shares, the delivery and payment were in the first instance deferred to the 25th of February, and were afterwards repeatedly postponed from time to time by the purchaser's desire.

The rule, that a joint creditor cannot prove against one of his debtors, if another be solvent, is not confined to cases of partnership, but applies to co-contractors generally.

The mode in which these successive postponements were made was, according to the usual custom of business on the stock exchange, by selling on the day from which the postponement took place, and by repurchasing the like number of shares, to be delivered and paid for on the future day, to which it had been arranged that the

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payment and delivery should be deferred. All these successive sales and purchases were made at the market price, in the name of the bankrupt and his two co-purchasers, to whom the usual purchase and sale notes were handed. The rules of the stock-exchange required that the brokers should pay the parties, from whom the shares were bought, from time to time the amount of the purchase money; which they accordingly did; and the amount of their losses upon these purchases and sales, after deducting the gains from them, was 628*l.*; and this, together with 87*l.* 15*s.*, due to the petitioners for commission upon the purchases, making in all 715*l.* 15*s.*, had been reduced by payments on account to 309*l.* 6*s.*, the debt upon which the proof was tendered.

Mr. *Anderdon*, and Mr. *J. Adams*, in support of the petition, contended, that the rule as to a solvent partner extended only to the case of actual partners, and not to the case of mere co-contractors, in which light they insisted that the bankrupt *Greenwell* and *Johnson* were to be regarded; and they cited *Ex parte Bauermann*(a); *Ex parte Crossfield*(b); and *Ex parte Buckingham*(c); but

The Court having directed the earlier authorities upon the point to be looked into,

December 12. The case came on again on this day to be argued.

Mr. *Anderdon*, and Mr. *J. Adams*, in support of the petition. The rule, which excludes a proof

(a) Mont. & Ch. 569; 3 Dea. 476, S. C.

(c) 1 M. D. & D. 235.

(b) 2 M. & A. 543; 1 Dea. 405, S. C.



against the separate estate of one debtor, where there is a solvent partner, was only adopted as a consequence of, and a corollary from the rule which excluded such a proof, where there were joint assets. These rules do not depend on the doctrine, that a creditor, having two funds, shall not disappoint another creditor who has only one; that doctrine being merely applied for the purpose of marshalling the funds, after the creditor has elected to proceed against one of them, and not for the purpose of interfering with or disturbing his right to elect; *Aldrich v. Cooper*(a); *Wright v. Simpson*(b); *Ex parte Kendall*(c), and *Mason v. Bogg*(d).

To extend such a principle, so as to control the creditor, would be unreasonable; for although there may be an equity against the debtor, that he should pay both debts, there can be none against the creditor to compel him to adopt a remedy which he does not prefer, because another creditor has taken an imperfect security. The rule under consideration, not being derived from this principle, must be traced to some other source; and it will be found to have arisen entirely from the peculiarity of the constitution of a trading copartnership, which has been thus defined in *Bell's Commentaries*(e). "The firm constitutes a distinct person in contemplation of law, capable, independently, of maintaining with third persons, as well as with the individual partners, the relation of debtor and creditor; and the partners, although jointly and severally liable for all the debts and contracts of the firm, are so, not as primary or principal debtors or contractors, but rather as sureties of the

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(a) 8 Ves. 385.

(c) 17 Ves. 520.

(b) 6 Ves. 714.

(d) 2 Myl. & Cr. 443.

(e) *Bell's Commentaries*, b. 7, p. 619; see also *Story on Partnership*, 79.

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firm." It has been considered, that the connexion of a partnership firm, and of an individual partner, creates that sort of equity between them, which entitles the individual partner to say, that the partnership estate should be the primary fund to pay the partnership debts. The firm is, in fact, looked upon as a distinct person; and the rule (which originally was only applied to the case of joint assets) was founded on the notion, that, as the creditors had advanced their money on the credit of the joint estate, that estate was therefore the primary fund for repayment. It was a rule, however, of which Lord *Eldon* expressed his disapprobation, although he considered it too well settled to be departed from. Cases in which it was applied, in the case of joint assets, are *Ex parte Elton*(a), *Ex parte Abell*(b), *Ex parte Clay*(c), *Ex parte Chandler*(d), *Ex parte Hubbard*(e), *Ex parte Ackerman*(f), *Ex parte Tait*(g), *Dutton v. Morrison*(h), *Ex parte Machell*(i), and *Ex parte Peake*(k). The following, which are the only cases involving the question as to the solvent partner, are either in the petitioners' favour, or are distinguishable from the present case. *Ex parte Pinkerton*(l) was decided in favour of the joint creditor; and,

(a) 3 Ves. 242.

(e) 13 Ves. 424.

(i) 3 Ves. &amp; B. 216.

(b) 4 Ves. 837.

(f) 14 Ves. 605.

(k) 2 Ro. 54.

(c) 6 Ves. 814.

(g) 16 Ves. 193.

(d) 9 Ves. 35.

(h) 17 Ves. 207.

(l) 6 Ves. 814. The following is the statement of the case from the Order Book:—

Monday, the 20th day of April 1801.

In the matter of *Simon Longstaff*, a bankrupt.

Whereas *Thomas Pinkerton*, of Butcher Row, East Smithfield, merchant, did, on the 21st January last, prefer his petition to the then Lord Chancellor of Great Britain, showing, that in or about the month of August 1796, the said *Simon Longstaff* was the owner of a certain ship or vessel called the "Apollo," commanded by Captain *Thomas Robson*, and which

from the Order Book, it appears that the transaction out of which the debt arose was an adventure, constituting

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was then about to proceed on a voyage from London to Jamaica; that one *Archibald Sinclair*, of London, ship and insurance broker, applied to the petitioner to purchase 200 barrels of herrings for the said *Simon Longstaff* and *Thomas Robson*, to be taken as an adventure in the said ship *Apollo*; that the petitioner agreed to sell the said 200 barrels of herrings for the sum of 223*l.* 18*s.* 6*d.*, at a credit of six months, upon the said *Simon Longstaff* and *Thomas Robson* giving their joint acceptance for the same; that the petitioner accordingly drew his bill of exchange, bearing date at London, the 24th day of August 1796, upon the said *Simon Longstaff* and *Thomas Robson*, whereby he required them, six months after the date thereof, to pay to his order the said sum of 223*l.* 18*s.* 6*d.*, for value delivered in herrings, and the said *Simon Longstaff* and *T. Robson* afterwards accepted the said bill, payable at the said Mr. *Archibald Sinclair's*; that the said bill was duly presented to the said *Archibald Sinclair* for payment when due, who declined to pay the same, alleging that he had no effects; that a commission of bankruptcy, under the great seal of Great Britain, bearing date at Westminster, the 5th day of July 1797, hath been awarded and issued against the said *Simon Longstaff*, and he hath been duly found and declared a bankrupt; and *Thomas Jackson*, of the Coal Exchange, London, coal factor, and *Thomas Raffield*, of Shadwell, in the county of Middlesex, sail maker, were duly chosen assignees of his estate and effects; that the petitioner, never having received the amount of the said bill of exchange from the said *T. Robson*, attended a meeting of the major part of the commissioners named in and authorized by the said commission against the said *Simon Longstaff*, held at the Guildhall, London, on the 25th day of March last, in order to prove the said sum of 223*l.* 18*s.* 6*d.* under the said commission, when the said commissioners informed the petitioner they could not receive the proof of the said debt, without your lordship's order, but the commissioners admitted the same as a claim on the said bankrupt's estate, and directed a dividend to be reserved in respect thereof, and therefore praying his lordship that he might be admitted a creditor under the said commission for the said sum of 223*l.* 18*s.* 6*d.*, and that he might be paid out of the said bankrupt's estate the dividend or dividends in respect thereof, rateably and in equal proportion with the other creditors of the said bankrupt seeking relief under the said commission, or that his lordship would make such other order in the premises as to him should seem meet; whereupon all parties concerned, or their agents, were ordered to attend the late Lord Chancellor on the matter of this petition, upon the next day of petitions, and counsel for the petitioner, and also for the assignees of the estate and effects of the said bankrupt, this day attending accordingly: Now, upon hearing the said petition read, and what was alleged by the

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a limited partnership. The bill of exchange mentioned in the report was given for the price of 200 barrels of herrings, to be exported on speculation. In *Ex parte Kensington* (a) a partnership is spoken of, and Lord Eldon puts his decision on the footing of Lord Rosslyn's rule. What the exact facts were, is not stated, and, the petition having been dismissed, nothing can be learned from the Order Books. In *Ex parte Sadler* (b) *Ex parte Kensington* is spoken of as an extension of the rule, and Lord Eldon seemed to doubt its correctness; but the question did not require a decision. *Ex parte Yonge* (c) is a mere *dictum*. In *Ex parte Harris* (d) the doctrine is spoken of, *arguendo*; but, there being joint estate, the question did not arise. *Ex parte Janson* (e), though a strong authority in favour of the rule itself, proves its restriction to actual trading partnerships, where a joint commission might issue. If the transaction itself will authorize a commission, by making both debtors bankrupt, the creditor may at all events get either his debt, or a dividend. But in the case of a mere co-contractorship, one debtor may be a trader, and become bankrupt; the other may not be within the bankrupt laws; and since,

counsel for the said parties, I do order that it be referred to the commissioners named in the said commission to take an account of what is due and owing from the petitioner to the estate of the said bankrupt, and what shall be found to be due from the petitioner as aforesaid is to be deducted from the said sum of 223*l.* 18*s.* 6*d.*, and he is to be allowed to prove the remainder, and is to be paid a dividend and dividends in respect thereof, rateably and in equal proportion with the rest of the said bankrupt's creditors seeking relief under the said commission, but so as not to disturb any dividend or dividends already made under the same.

N.B. The fact that there were no joint assets does not appear in this Order; but, from the entry in the minute-book, it appears that Lord Eldon directed it to be recited as mentioned in the report.

(a) 14 Ves. 447.

(c) 3 V. &amp; B. 39.

(e) 3 Madd. 229.

(b) 15 Ves. 55.

(d) 1 Mad. 583.

until lately, there were no means of establishing adversely legal insolvency, he might be solvent in law, and yet not able to pay a shilling in the pound; so that the creditor would be wholly deprived of his debt. With respect to the next case of *Ex parte Morris* (a), which might appear to be a case of co-contractors merely, as reported, the Order Book shows that there was an actual partnership created by deed, and a grant by the partnership of the annuity mentioned in the case, with a pledge of partnership property to secure it (b).

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(a) Mont. 218.

(b) The following recitals in the Order show the nature of the security:—  
“Whereas *Michael Morris*, of Doris Street, Lambeth, gentleman, did, on the 6th day of March last, prefer his petition to the Right Honourable the Lord High Chancellor of Great Britain, shewing, that, by virtue of an indenture bearing date the 10th November 1825, and made between *James Trusler, Samuel Barrett, M. Barrett, John Dunston*, the above named *D. Desormeur*, and *T. Dyer*, the abovenamed parties thereto became joint and equal partners for carrying on the trade therein mentioned; and it was thereby provided, that any one of the said partners might retire from the trade, on giving six months' notice of his intention so to do; and it was also provided, that the continuing partners should give a bond to the retiring partner, in a sufficient penalty, to indemnify him from the debts and engagements of the firm due and to be purchased at the time of the retiring of any of the partners. That by another indenture bearing date the 24th January 1827, and made between the said parties of the first part, *Thomas Dunston*, therein described, of the second part, *John Allwood*, of the third part, and *John Deans* and *Edwin Giles*, of the fourth part, it was amongst other things recited, that the said partners last mentioned had contracted with the said *Thomas Dunston* for the sale to him of an annuity of 160*l.* per annum, for the sum of 1995*l.*, and it was therein also recited, that the said *Thomas Dunston* had that day paid, or caused to be paid, into the hands of the said partners the said sum of 1995*l.*, in notes of the Governor and Company of the Bank of England; and the said indenture witnessed, that, in consideration of the said sum so advanced, they the said partners granted unto the said *Thomas Dunston* an annuity of 160*l.* per annum as therein mentioned, and they thereby also assigned certain patent rights, therein also described, to secure the payment of the same annuity.”

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Mr. *Russell*, and Mr. *Little*, for the respondents, were stopped by the Court.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. This is a case of a joint debt, due from the bankrupt and two other persons, one of whom is solvent and living in England; and the question is, whether the joint debt is to be proved under the fiat against one of the three debtors, in competition with his separate creditors.

I conceive that a long course of practice, founded on decisions of great authority, had settled the point against the right of proof, before the Bankruptcy Court Act passed. Such was the law I apprehend, clearly, when the act passed; and I am not aware that either that, or any other statute, has varied the law in this respect, or that any subsequent decision of the Lord Chancellor or the House of Lords, at variance with the rule, has taken place. I must therefore act upon the rule, and upon that ground dismiss the petition. It has been ingeniously argued, that the rule does not apply where the joint debtors were not all traders, subject to the bankrupt laws, or where there was no partnership between them in the common, which is a restricted, sense of that term, or where, from the nature of the connection between the joint debtors, there would be no joint property incident to the connection. I am not aware of any such limitation of the rule, and therefore I do not pronounce any opinion, whether if the rule were so limited, that would help the petitioner's case.

With regard to the arguments ably urged upon the policy or abstract justice of the rule; if the rule is established, as I think it is, those arguments, whether

they are sound or unsound, are not properly the subject of judicial consideration.

The dismissal must be without prejudice to any right, which the petitioners may have otherwise than as joint creditors of the three, or to any right of proof that they may have otherwise than for the purpose of receiving a dividend in competition with the separate creditors.

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Ex parte ATKINS.—In the matter of AYSHFORD WISE,  
NICHOLAS BAKER, and WILLIAM SEARLE BENTALL.

*Lincoln's Inn,  
December  
12 & 21.*

THE bankrupts were bankers, trading in partnership under the name of the Newton Bank, at Newton Abbot in Devonshire; and this was the petition of one of their customers, who claimed payment in full, *first*, of the proceeds of a certain bill of exchange, indorsed generally, and paid by him into the bank, and not due at the date of the fiat; *secondly*, of a sum consisting of some country bank notes and cash, which he alleged to have been paid in for a specific purpose, to which it had not been applied; and *thirdly*, of the proceeds of a bank post bill, which the petitioner sent to the bank inclosed in a letter dated the 13th of July, containing the following passage, "I inclose a bank post bill, value 48*l.* 9*s.* 10*d.*, which I shall be obliged by your placing to my credit, and I will thank you to send me a receipt by the bearer." The assignees had, since the fiat, received the amount of the bills of exchange, notes, and bank post bill; and an action to recover this amount from them had been brought, but not proceeded with, the parties desiring the questions to be disposed of by this Court. The evidence adduced

A bill of exchange remitted by a customer to his bankers, and not due, but remaining in specie at the time of their bankruptcy, continues the property of the customer; and the same is the law as to a bank post bill, which the customer sends to the bankers, with a letter desiring them to place it to his credit, and to send him a receipt.

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was contradictory as to the custom and usage of the bankrupts and of other banks in the neighbourhood, with respect to bills of exchange and bank post bills; it being deposed on one side, that such securities were, in the absence of instructions to the contrary, treated as cash payments, the customer having immediate credit and being entitled to draw in respect of them,—while the witnesses on the other side stated that a special agreement would be necessary to produce this result. It appeared, however, that credit had been given to the petitioner in his account with the bankrupts, for the amount of the bills of exchange and bank post bill, and that receipts had been given to the petitioner in the same way as if these amounts had been cash payments.

Mr. *Follett*, in support of the petition. As to the bills of exchange, the law is settled by the authority of *Thompson v. Giles (a)*. And with regard to the country bank notes and cash, they, having been paid for a specific purpose, and not having been applied accordingly, remained the property of the petitioner. The only other question is that relating to the bank post bill, which is also disposed of by the case of *Thompson v. Giles*, there being no distinction in principle between a bank post bill and ordinary bills of exchange. The case of *Thompson v. Giles (a)* was approved of by Lord *Lyndhurst* in *Ex parte Armstead (b)*, and by Lord *Cottenham* in the case of *Jombart v. Woollett (c)*.

Mr. *Anderdon*, and Mr. *Bacon*, for the assignees. The evidence in this case, as to the custom of banking in the neighbourhood and with these bankrupts, shows

(a) 2 B. & C. 422.      (b) 2 G. & J. 371.      (c) 2 Myl. & Cr. 402.



that the understanding between the parties was, that the bills of exchange were paid in, not by way of deposit merely, but so as to give the customer credit immediately, and to enable him to draw, although the bills had not become due; *Thompson v. Giles* was said by the Lord Chancellor in *Ex parte Benton* (a) to be at variance with what was said by Lord Eldon in *Ex parte Sargeant* (b), and cannot be reconciled with *Ex parte Pease* (c). Supposing that case to be law, it does not apply to the bank post bill; such bills being universally regarded in the same light as Bank of England notes. [The *Chief Judge*. Was the bill accepted?] It appears it was not; but we submit that that makes no difference, the acceptance being generally omitted for the sake of security, when bank post bills are sent into the country. The omission does not render them less available, when presented by the proper party. [The *Chief Judge*. Suppose, after paying into the bank a bank post bill, the customer required it for some special purpose, and the bankers refused to give it up, you must contend that the refusal would be justifiable?] We submit that it would, especially under circumstances like those of the present case, where the petitioner accompanied the bank post bill with a letter, desiring that it should be put to his credit, and that a receipt for the amount should be sent to him. [The *Chief Judge*. Another consequence of the argument would be, that in a case of *vis major*, such as a burglary, by which the bank post bill was lost, the loss would fall upon the bankers.] So we submit it would, the bank post bill being merely cash in another form.

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(a) Mont. &amp; Bligh, 133.

(b) 1 Ro. 153.

(c) 1 Ro. 232.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J. I understand, that neither party wishes that the opinion of a court of law should be taken upon the point, as to the bill of exchange; and it has been in fact admitted, that the Court cannot, consistently with the principle of the decision in *Thompson v. Giles* (a), refuse the petitioner the relief which he asks. That is also my opinion. Now I apprehend that *Thompson v. Giles* is not inconsistent with any of Lord *Eldon's* decisions. It has moreover been approved of by two judges, who have held the great seal since Lord *Eldon's* time; and I must therefore grant the prayer of the petition, so far as regards the bill of exchange.

With regard to the second question, relating to the country bank notes and cash, the evidence does not appear sufficient to enable me to decide the question, although I think it such as to entitle the petitioner to an inquiry, had the amount been sufficient to warrant it. As, however, there will be a dividend of 7s. 6d. in the pound, I think that, considering the smallness of the sum in dispute, I ought not to put the parties to the expense of the inquiry, and therefore allow the matter to stop where it is, without deciding anything with respect to it. The reply consequently may be confined to the question, with reference to the bank post bill.

Mr. *Follett* in reply, cited *Toovey v. Mylne* (b), and *Ex parte Dumas* (c).

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VICE-CHANCELLOR KNIGHT BRUCE, C. J. The cases of *Ex parte Pease* (d) and *Thompson v. Giles* (a) seem to me to contain correctly expressed doctrine, applicable

(a) 2 B. & C. 422.

(c) 1 Atk. 232.

(b) 2 B. & Ald. 683.

(d) 19 Ves. 46, 58, 60; 1 Ross, 154.

to the present case, upon which I have already expressed an opinion favourable to the petitioner as to the short bill of 50*l.*, and have stated the grounds upon which, thinking myself at present without materials sufficient for a similar decision as to the 20*l.*, I do not consider it right to direct an inquiry as to that sum.

As to the bank post bill for 48*l.*, had the amount been considerable, or had the parties not desired to avoid sending the question to be tried in an action, I should have directed the existing or some other action to be tried with admissions. Under the circumstances, finding myself obliged to decide this point, and having considered it, I have come, though not without hesitation, to the conclusion, that it must be decided in the petitioner's favour. My doubt has been, whether,—not “from the habits of dealing between the parties,” but from the relation of banker and customer, the nature of the particular paper, and the general and ordinary mode in which paper of that kind is treated and considered by the world,—the bank post bill ought not to be deemed to have been paid by the customer, and received by the bankers, as cash, so as to change the property from the instant when it reached their hands. If the bankers had, in truth, without asking or consulting the petitioner, treated the paper as their own, and paid or passed it away accordingly, it would (saying the least) seem harsh to have considered that a breach of trust, or a wrongful act, the petitioner being credited with the full amount. If such would have been strictly his right, it would probably have appeared rigid, extreme, and unusual, to have asserted it adversely. And it is possible, that, consistently with the absence of any change in the property while the paper remained with the bankers, it might be held that they

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had a tacit permission so to use it, crediting the customer with the full sum. Upon this particular point, however, it is not necessary to express an opinion.

Suppose, all other facts being as they are, the customer had drawn a cheque on the bankers for a sum exceeding his balance if the post bill were not taken into the account, and the bankers had refused to honour the cheque in respect of that deficiency, which, without reckoning the bank post bill, there was, but which the bank post bill would have covered,—would they have been liable to an action, as in *Marzetti v. Williams*(a)? It seems to me, that, with no other facts in the case than such as I have supposed, and those before me, the action could not have been maintained; as the defendants might have said, truly, that an unaccepted bill, though of the bank of England, payable seven days after sight, was for many purposes not equivalent to cash, and that their duty would be performed by transmitting the paper to London for acceptance, and raising the money upon it within a reasonable time. Such, I apprehend, would have been the state of things in that case, resulting from the relation of banker and customer, not regulated or qualified by any particular agreement express or to be inferred. Here I cannot collect any such regulating or qualifying agreement. If the bankers could for any purpose have declined to consider this paper as cash, against themselves, the property was not changed. On the whole, my impression is, that there was no change of property; that is, that, strictly, and according to the extreme right which either party could have enforced against the other, this bill had never assumed the character of cash between them.

The consequence is, that, dismissing the petition as to

(a) 1 B. & Adolph. 415.

the four country bank notes and the silver, I give the petitioner an Order as to the rest. The circumstances under which I refuse him an Order as to the four country bank notes ought, I think, to prevent that refusal from making any difference in costs.

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Ex parte JOHN HAMPDEN GLEDSTANES and others.—In the matter GARDNER BOGGS, WILLIAM TAYLOR, and WILLIAM SHAND the younger.—

THIS was a petition of creditors, praying that the proceeds of certain goods might be applied to the payment of a bill of exchange.

The bankrupt, *Gardner Boggs*, carried on business at Liverpool on his separate account, as a merchant and shipowner, and also traded in partnership with *William Taylor* and *William Shand* the younger, as merchants and shipowners in Great Winchester Street, London, under the firm of *Boggs, Taylor & Co.*

The bankrupt *William Shand* the younger was also engaged in copartnership with *William Bruce* and other persons, as merchants at Calcutta, under the firm of *Bruce, Shand & Co.*

Bruce, Shand & Co. were the general agents in Calcutta of *Gardner Boggs* in his separate business, who was in the habit of commissioning to them ships of which he was owner or part-owner, and of making consignments of goods for sale; and *Bruce, Shand & Co.* were in the habit of purchasing goods to be sent to England by the same ships on their return voyage to *Gardner Boggs*, the same being frequently purchased with their

Lincoln's Inn,
December 14.

B. S. & Co., of Calcutta, having consigned certain goods to *G. B.* in England, on which they had a lien for the price, write him word that they intend to draw in favour of *G. K. & Co.* for the balance of such shipments, and that they inclose bills of lading and policies of insurance for the goods in question; and they also draw a bill for the amount on *G. B.*, in favour of *G. K. & Co.*, which they direct *G. B.* to "place to account of shipments per *Gardner*." Before the goods reach England *G. B.* becomes bankrupt, and the goods come to the possession of his assignees. *Held*, that the above expres-

sions in the bill and the letter amounted to a specific appropriation of the goods for the payment of the bill, and that the assignees were bound to account to *G., K. & Co.* for the proceeds.

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own money, or on their own credit, and before the outward cargoes could be disposed of; in the course of which dealings, *Bruce, Shand & Co.* were frequently creditors of *Gardner Boggs* to a large amount. *Boggs, Taylor & Co.* had also extensive dealings with *Bruce, Shand & Co.* of a like nature.

In August 1841, *Gardner Boggs* consigned various goods to *Bruce, Shand & Co.* on board the ship *Gardner*, which was jointly owned by himself and one Mr. *M'Intyre*, but of which *Gardner Boggs* was the managing owner, and advised them by letter that the goods were shipped on account of *Boggs, Taylor & Co.*

On the 16th December 1841, *Boggs, Taylor, & Co.* stopped payment, and in the course of a day or two afterwards, *Gardner Boggs* also suspended payment at Liverpool.

On the 2nd March 1842, a joint fiat was issued against the three bankrupts.

In the mean time, the ship *Gardner* with her outward cargo arrived at Calcutta in December 1841, when *Bruce, Shand & Co.* unloaded the cargo, and before the same was realized, with their own money and with their own credit purchased goods to load the ship on her homeward voyage for *Gardner Boggs*, which were shipped by them to him; and, in order to reimburse themselves, they drew several bills of exchange on *Gardner Boggs*, to the amount of 7362l. 16s. 3d., the price of the goods so purchased by them. Among the bills so drawn was one for 1362l. 16s. 3d., in favour of the petitioners, who were the agents in London of the firm of *Bruce, Shand & Co.* The other bills were sold by *Bruce, Shand & Co.* to various persons at Calcutta, to whom they at the same time handed over, annexed to such bills of exchange, the

bills of lading and the policies of insurance relating to certain portions of the homeward cargo; one of such bills for 3000*l.* being sold by them to Messrs. *M'Intyre*.

On the 29th January 1842, *Bruce, Shand & Co.* addressed a letter to *Gardner Boggs* on the subject of the return cargo, and the several bills which they had drawn in respect of it, in which they informed them that they had sold the bill for 3000*l.* to Messrs. *M'Intyre*, and had placed in their hands, as collateral security, the bills of lading and policies of insurance for a certain portion of the cargo, and they thus expressed themselves in the postscript: "As we will draw in favour of Messrs. *Gledstones & Co.* for the balance of the shipments per *Gardner*, we inclose bills of lading and policies for the 775 bags of rice, and 300 bales jute." This letter, with the invoices, bills of lading, and account current arrived in England on the 10th March 1842, which was after the issuing of the fiat; when they were taken possession of by the assignees.

On the same 10th March, the petitioners also received a letter from *Bruce, Shand & Co.*, in which was inclosed the bill for 1362*l.* 16*s.* 3*d.*, of which the following is a copy:

"No. 5. Exchange for 1362*l.* 16*s.* 3*d.*

"Calcutta, 19 January 1842.

"At ten months after date, pay this first bill of exchange (second and third of same time and date unpaid) to the order of Messrs. *Gledstones, Kerr & Co.*, one thousand three hundred and sixty two pounds, sixteen shillings, and three pence, *which place to account of shipments per Gardner.*

Your obedient Servants,

Bruce, Shand, & Co.,

Payable in London.

"To *Gardner Boggs, Esq.*
Liverpool.

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The petitioner alleged, that the three firms of *Bruce, Shand & Co., Boggs, Taylor & Co., and Gardner Boggs,* were each indebted to the petitioners to an amount much exceeding the amount of the above bill.

Since the date of the bill, *Bruce, Shand & Co.* had become insolvents.

The homeward cargo shipped by the *Gardner* had come to the possession of the assignees of *Boggs, Taylor & Co.,* who refused to permit any part of the proceeds to be applied to the payment of the above bill of exchange.

The prayer was, that the petitioners might be declared entitled to be paid the amount of the bill for 1362*l.* 16*s.* 3*d.*, with interest at the rate of 5*l.* per cent., from the time when the bill would have become due, if accepted, out of the proceeds of the 775 bags of rice, and 300 bales of jute; and that it might be declared that the petitioners had a lien on the same, and the bills of lading thereof, for the amount of such bill and interest.

Mr. *Piggott*, and Mr. *Heathfield*, in support of the petition. In this case, the petitioners had a clear lien on the proceeds of the rice and jute, in order that the same might be applied in payment of the bill for 1362*l.* 16*s.* 3*d.* The postscript of the letter from *Bruce, Shand & Co.* to *Gardner Boggs*, of the 29th January 1842, says expressly, "as we will draw in favour of Messrs. *Gledstanes & Co.* for the balance of the shipments per *Gardner*, we inclose bills of lading, and policies for the 775 bags of rice, and 300 bales of jute." In *Ex parte Prescott (a)*, where *A.* supplied goods at his own cost to *B.* and *C.*, which it was agreed should be shipped on the joint account of the three, and that *B.* and *C.* should accept

(a) 1 Mont. & A. 316; 3 Deac. & C. 218.

bills drawn by *A.* on account of the return proceeds, and that the bills should be paid out of such proceeds, it was held that the indorsees of the bills, with whom *A.* had discounted them, although they had no knowledge of the bills being drawn on account of the joint shipment, had nevertheless a lien on the return proceeds of the shipment, which came to the hands of the assignees of *B.* and *C.* subsequently to their bankruptcy. [The *Chief Judge*. In that case there was a partnership in the goods; the shipment was a joint adventure of the three.] Sir *George Rose* says in his judgment, that the question of partnership was immaterial; and that when the drawer of the bills indorsed them, he at the same time transferred his rights thereon, and his means of enforcing and satisfying them, and all his equities; and he adds, that he always understood that the principle on which *Ex parte Waring (a)* was founded, was this—that where the original intention of the parties was to appropriate property to a certain purpose, in such a transaction bankruptcy would not affect that intention, nor deprive third parties of the benefit of it. This principle was also acted upon in *Buchanan v. Findlay (b)*, where *A. & Co.* remitted a bill to *B. & Co.*, with directions to get it discounted, and apply the proceeds in a particular way; and *B. & Co.* did not get the bill discounted, but received the money when it became due, before which time *A. & Co.* became bankrupt; and it was held, that *B. & Co.* were liable to be sued for the amount by the assignees of *A. & Co.*, as money received to their use. So, in *Ex parte Smith (c)*, it was decided that the indorsee of notes issued by a bank, on the deposit of certain goods as a

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(a) 2 Rose, 182; 19 Ves. 350; 2 G. & J. 404.

(b) 9 B. & C. 738.

(c) 6 Ves. 447.

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security for the payment of the notes, had a right to have the goods applied in discharge of the notes.

Mr. *Swanston* appeared for Messrs. *M'Intyre*, who had purchased the bill for 3000*l.*, and submitted to any Order of the Court.

Mr. *Anderdon*, for the assignees. The cases cited have no bearing on the present question. The facts of this case are very different from those of *Ex parte Waring* (a) and *Ex parte Prescott* (b), in which two firms were bankrupt, and the Court was administering two bankrupts' estates. Supposing there was any equity in this case, there can be no transfer of an equity to a third person. The postscript of the letter of the 29th January 1842, that has been so much relied on, was merely a direction to the acceptor of the bills for his guidance. The bill of exchange itself does not refer to any fund out of which the bill was to be paid, but merely to an account relating to a particular ship. Suppose all the parties in this transaction had continued solvent, could a bill have been filed by *Gledstanes & Co.*, to establish an equity on the proceeds of these goods? Then, does bankruptcy supervening give them any greater equity? [The *Chief Judge*. Do you say, that *Bruce, Shand & Co.* intended to trust *Boggs* with the sole disposition of the goods shipped by the *Gardner*?] I submit, it is clear that such was their intention; for they inclosed the bills of lading and the policies of insurance on these goods in their letter to *Boggs* of the 29th January 1842, although in the same letter they informed him, that they had placed the bills of lading and policies of insurance

(a) 2 Rose, 182; 19 Ves. 350; 2 G. & J. 404.

(b) 1 Mont. & A. 316; 3 Dea. & C. 218.

for a certain other portion of the cargo in the hands of Messrs. *M'Intyre*, as collateral security for the payment of the bill for 3000*l*. If *Bruce & Co.* intended to give the petitioners a lien on the rice and jute, for the payment of the bill for 1362*l*., they would have done as they did with respect to Messrs. *M'Intyre*, and have transmitted the bills of lading and policies to the petitioners.

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Mr. *Piggott*, in reply. The shipments of the outward cargo, and the homeward cargo, were perfectly distinct transactions; *Bruce, Shand & Co.* had clearly a lien on the return cargo, for their advances in purchasing the goods of which it was composed. Cannot they assign their lien on part of the cargo to another person?

The VICE-CHANCELLOR KNIGHT BRUCE, C.J.—A bill of exchange may be so constructed as to carry a lien on specified property for the payment of it, and the question is, whether or not it was so in the present case. The bill, in respect of which the petitioners claim a lien on certain goods, contains these words, “which place to account of shipments per *Gardner* ;” and the Court is now called upon to construe the meaning of these words. To do this, it is requisite to look to the relation between the several parties to this petition. It appears that *Bruce, Shand & Co.* of Calcutta, who were employed as the agents of *Gardner Boggs*, and also of *Boggs, Taylor & Co.*, purchased goods on their own credit, but for the sole benefit of *Gardner Boggs*. It is clear, that *Bruce & Co.*, having purchased these goods with their own money, had a lien on them for the amount of the price which they had paid for them; they could not have been required to part with them, without being

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repaid the amount of their advances. They drew certain bills on *Boggs* for the amount of these advances; most of which bills they sold to different persons, to whom they delivered bills of lading of particular goods, as security for the payment of the bills which they had sold. They had a right, of course, to deal with the remainder of the cargo in the same way. They accordingly drew a bill on *Gardner Boggs* for 1362*l.* 16*s.* 3*d.*, being the residue of the price of the cargo, and sent this bill to their own agents in London, the present petitioners. They also wrote to *Gardner Boggs*, to advise him of their intention to draw this bill on him, saying, "as we will draw in favour of Messrs. *Gledstanes & Co.* for the balance of the shipments per *Gardner*, we inclose the bills of lading and policies for the 775 bags of rice, and 300 bales jute." It is contended on the part of the assignees, that all this showed an intention of *Bruce, Shand & Co.* to trust to the present responsibility of *Gardner Boggs*, and a consequent relinquishment of their lien on the goods for the amount of the price. But that intention is certainly not exhibited by their letter to *Boggs*. It does not, however, rest upon the letter alone, emphatic as is the expression contained in the postscript; for when we come to the bill itself, we find also these words, "which place to amount of shipments per *Gardner*." Now, it appears to me, that as between drawer and drawee, this was a specific appropriation of particular funds for the payment of the bill. But, according to the argument urged for the assignees, these words are to be held superfluous. It is requisite, however, to give some meaning to these words; and the interpretation which I think most consistent with justice, most consistent with fair dealing, and with mer-

cantile customs, is, that the bill should be paid out of the shipments by the *Gardner*. As to the circumstance of the bill not being due for ten months after it was drawn, —with that, I think *Boggs* had nothing to do. On the whole, I think there is nothing to prevent the Court from dealing with the case as justice requires, and I therefore feel myself bound to declare, that the proceeds of the goods mentioned in the postscript of the letter from *Bruce & Co.* to *Boggs*, are liable to the payment of this bill.

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ORDER as prayed,—the petitioners and the assignees to have their costs out of *Boggs'* separate estate; the petitioners undertaking to pay the costs of Messrs. *M^r Intyre*.

Ex parte MICHAEL HINTON CASTLE.—In the matter of DANIEL WADE ACRAMAN, WILLIAM EDWARD ACRAMAN, and ALFRED JOHN ACRAMAN.

AND

In the matter of DANIEL WADE ACRAMAN, WILLIAM EDWARD ACRAMAN, ALFRED JOHN ACRAMAN, WILLIAM MORGAN, THOMAS HALROYD, and JAMES NORROWAY FRANKLYN.

Lincoln's Inn,
December 21
and 23.

THE bankrupt, *William Edward Acraman*, was a son of the bankrupt, *Daniel Wade Acraman*; and this was the petition of one of the separate creditors of the son to have the proceeds of certain property, which was in the

A father by deed assigns to his son, in consideration of natural love and affection, certain pictures and effects, upon trust to permit

the father to have the present use and enjoyment of them during his life, and subject thereto to the proper use and benefit of the son. Formal possession is delivered to the son upon the execution of the deed, by the delivery of one picture in the name of the whole; but the father remains in possession till his bankruptcy. Held, that the assignees were entitled to the goods.

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possession of the father at the time of the bankruptcy, carried to the credit of the separate estate of the son. The property in question, which consisted of a valuable collection of pictures, and other effects, belonged to the father in the month of August 1839, when he addressed the following letter to the son:—

Clifton, 1 Cornwallis Terrace,
 August 29th, 1839.

“ My dear Son,

I give you all my plate and plated articles, except such as I have named in my will for *Edith*; I also give you all my collection of paintings, except such as I have given to your sisters. I give you likewise all the buhl furniture, cabinets, and their contents, mosaic tables, bronzes, marbles, carved ivory articles, and ornamental china, for your sole use and benefit,

Your affectionate father,

Witness,

D. W. Acraman.

Ann Langdon Westcote.

Afterwards the father executed a deed, dated the 17th October 1839, and expressed to be made between himself of the one part, and the son of the other part, whereby it was expressed, that in consideration of the natural love and affection which the father had and bore to the son, and for the nominal consideration therein mentioned, the father gave, granted, and confirmed to the son, all and singular the pictures, paintings, plate, goods, chattels and effects mentioned or described in or by the inventory or schedule thereof thereunder written, or thereupon indorsed, or howsoever otherwise the pictures, paintings, plate, goods, chattels, and effects by the indenture given, granted and confirmed, or intended so to be, or any of them ought to be described, together

with the frames or appurtenants thereto, or to any part thereof belonging or appertaining, and all the estate, right, title, interest, claim, and demand whatsoever of the father in, to, of or upon the same, or any of them, or any part or parts thereof; To have and to hold all and singular the pictures, paintings, plate, goods, chattels and effects thereby given, granted, and confirmed, or mentioned and intended thereby so to be, with their appurtenants, unto and by the son, his executors, administrators and assigns, upon trust, nevertheless, to permit and suffer the father to have the personal use and enjoyment of the said pictures, paintings, plate, goods, chattels, and effects, or such of them as he should think fit, for and during the term of his natural life; and from and after the decease of the father, and in the mean time, subject to the aforesaid trust, to and for the only proper use and benefit of the son. There was a schedule, containing a catalogue of the pictures and effects.

The father remained in possession of the effects assigned by the deed until his bankruptcy. He stated, in an affidavit in support of the petition, that the deed was prepared by his own solicitor, and that at the time of its execution formal possession of the pictures and effects was given to the son according to the deed, by the delivery of one picture in the name of the whole. He further stated, that he had mentioned to various persons with whom he was in the habit of communicating, the circumstance of his having made over the property to his son. He admitted, that after the execution of the deed, he had on more than one occasion disposed of some of the pictures comprised in it, without having previously asked the consent of his son, but he said that such pictures were of an inferior cha-

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racter and value, and that no such disposition was made, except for the purpose of improving the collection, by replacing the pictures disposed of by others of a superior description. He also deposed, that a short time before the issuing of the fiats it was agreed between him and his son, that some of the pictures should be sold to raise money for the subsistence, and rent and taxes of himself and his son, together with other pictures, and that the son received the proceeds of such of the pictures sold on that occasion as were comprised in the deed of gift. The petition was opposed on behalf of the separate creditors of the father, who insisted that the pictures and property belonged to the father at the time of his bankruptcy, or at all events were in his reputed ownership.

Mr. *Swanston*, and Mr. *Osborne*, in support of the petition. The assignment was valid, being completed by formal delivery of possession; it cannot be impeached under 6 *Geo.* 4. c. 16. s. 73., for there is no proof nor any pretence for suggesting that the father was at the time insolvent, or that the transaction was otherwise than a *bonâ fide* one. [The *Chief Judge*. Independently of the bankrupt laws, could the transaction be supported consistently with *Twyne's case* (a)?] *Twyne's case* was decided upon the ground of fraud, which is not imputed here; and besides, according to the report, the grantor of the goods was insolvent, for he is stated to have been indebted in 500*l.*, while the goods in question were of the value of 300*l.* only. Here too, the possession is consistent with the provisions of the deed, a circumstance on which

(a) 3 Rep. 80.

some of the authorities (a) have proceeded, and which quite distinguishes this from *Twyne's case*. As the son was only entitled in remainder, there could be no fraud in his permitting what he could not prevent, the enjoyment by the tenant for life. [The *Chief Judge*. That might be so, if the property had been bequeathed upon these trusts by a will, so that the father had not been originally the absolute owner of them; which is a distinction adverted to in the judgment in the *Earl of Shaftesbury v. Russell* (b). But what change of possession was there here, to denote the alteration of the father's interest?] There may be a conveyance of chattels, without delivery or change of possession. *Shepherd's Touchstone*, 227. [The *Chief Judge*. No doubt, in the case of a sale of goods, taking possession is not necessary, and the purchaser may maintain trover without delivery; but suppose a father said to a son, I give you this chair, and the son did not take it, could he maintain trover?] The petitioner's case does not require the principle to be carried to that extent. Supposing then the case not to be within the statute of *Elizabeth* (c), or the 73rd section of the Bankrupt Act, the reputed ownership clause (d) affords the only other argument on which the respondents can rely. But to satisfy that section, there must not only be order and disposition of the bankrupt, but there must be the consent of the true owner. Now although the son was the true owner, yet his ownership was expressly subject to his father's enjoyment for his life, and he could not therefore be said to consent to that over which he had no control. *Darby v. Smith* (e) was

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(a) See *Martindale v. Booth*, 3 B. & Adol. 498, where, however, the assignment was for a valuable consideration, viz., an actual advance of money.

(b) 1 B. & C. 666.

(c) 13 Eliz. c. 5.

(d) 6 Geo. 4, c. 16, s. 72.

(e) 8 T. R. 82.

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decided in favour of the assignees, expressly on the ground of the trustees permitting the husband to have the order and disposition of the goods, contrary to the terms of the trust deed. And they cited *Lady Arundel v. Phipps* (a), *Edwards v. Harben* (b), *Jarman v. Woolaton* (c), *Cadogan v. Kennet* (d), *Ex parte Martin* (e), *Reed v. Wilmot* (f), *Ex parte Horwood* (g), *Lingard v. Messiter* (h), *Joy v. Campbell* (i), and *Ex parte Elliston* (k).

Mr. *Anderdon*, and Mr. *Dixon*, appeared on behalf of the separate creditors of the father.

Mr. *Russell*, and Mr. *Bacon*, appeared in support of the respective joint creditors of the two firms in which the father and son were partners.

December 23.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Upon two points, the parties to this petition are agreed; first, it is admitted, that if immediately before the bankruptcy *W. E. Acraman* had not a legal interest in the effects in question, the petitioner must fail. Whatever may be the true view of this, it must, in order to introduce the point of order and disposition, that, namely, which has been principally argued, be assumed at least in the petitioner's favour. Secondly, the parties admit, that if the original ownership and original possession of *D. W. Acraman* had been in the character of tenant for life only, and he had never had a greater interest in these effects, or any other possession than in that character, the petitioner would be right in

(a) 10 Ves. 139.

(b) 2 T. R. 587.

(c) 3 T. R. 618.

(d) Cowp. 434.

(e) 19 Ves. 491; 2 Rose, 331.

(f) 7 Bing. 583.

(g) Mont. & M'Ar. 169.

(h) 1 B. & C. 308.

(i) 1 Scho. & Lef. 341; 3 Bli. N. S. 110.

(k) 2 M. & A. 365.

the view that he takes of the question of order and disposition.

But these matters being not in dispute, it is in the first place not admitted by the respondents, that immediately before the bankruptcy, *W. E. Acraman* had any legal interest; and in the next place, it is contended on the part of *D. W. Acraman's* separate creditors, that if there were any such legal interest, the 72nd section of the 6 Geo. 4. c. 16., relating to reputed ownership, applies, and defeats the claim of the separate creditors of *W. E. Acraman*.

With regard to the question of reputed ownership, by which I mean reputed absolute ownership, it has indeed been almost admitted on the part of the petitioner, that it existed. It appears that some persons were informed by the father and the son, that there was some such arrangement as that which had taken place; but there was no public contemporaneous act declaratory of the transaction, nor any general publicity or notoriety contemporaneously, or otherwise, given to it, and there were in truth sales or exchanges made by the father after the deed, without previously consulting the son. The removals or changes that took place between the houses of the father and son, seem under the circumstances of little or no value or weight in this case. I must on the whole take the father to have been the reputed absolute owner, and to have had the ordering and disposition of the goods immediately before and at the bankruptcy.

The point upon which the petitioner's counsel have mainly relied has been, that the reputed ownership—the reputed absolute ownership—of *D. W. Acraman* was not with the consent of the true owner, and therefore that the 72nd section has no application; and they say that the possession of *D. W. Acraman*, after the deed, was that

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merely which was consistent with the deed, viz. that of a tenant for life, and therefore that only which *W. E. Acraman* was not entitled to prevent, obstruct, or restrict. As, however, *D. W. Acraman's* continuing possession was apparently, in the eyes of the world, referable and to be referred to his original title, in the absence of general notice of the change of title effected, or purporting to be effected by the deed, it is obvious that those, who, being able and concerned, and interested to give general notice of the change, omitted to do so, must be held at least to have willingly permitted that mistaken view of *D. W. Acraman's* circumstances and position as to this property to be entertained.

Now *W. E. Acraman*, being able, and concerned and interested to give that notice, and to make the matter public, especially as his father was a trader, omitted to do so. *W. E. Acraman* therefore must be held to have willingly permitted that mistaken view to be entertained, though he might have prevented it. *W. E. Acraman* might have made the deed, or the arrangement effected by it public and notorious. This was not done, and he must therefore be considered to have taken advisedly and by election the course of concealment; an expression which I use not in any disrespectful sense.

It was this concealment, or this absence of publicity or of information, which produced or caused the continuing reputation of absolute ownership, contrary to the fact. How then, treating *D. W. Acraman* as the true owner, can I avoid coming to the conclusion, that the possession of *D. W. Acraman* was not only a possession in the character of reputed absolute owner, but a possession in that character with the consent of the true owner?

I am obliged to say, that the consent of *W. E. Acraman*, under these circumstances, was not merely to the

enjoyment of *D. W. Acraman* as tenant for life, but was to something more; to that, namely, which is inconsistent, in the events which have happened, with the petitioner's claim. But though, as I have stated, I cannot at present accede to what the petitioner asks, I am not disposed to refuse him the opportunity of trying the question in an action at his risk, if he desires to do so.

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The petitioner declining to avail himself of this offer, the petition was dismissed, but without costs as against the father's estate, which was to bear its own.

Ex parte ROBERT SALKELD, Clerk.—In the matter of
O'NEILL, SALKELD, and DIGBY.—

THIS was a petition of one of the bankrupts to supersede the fiat, on the ground of the insufficiency of the trading. It appeared that the petitioner, who was a clergyman, in the year 1839 joined the two other bankrupts in certain mining speculations in Glamorganshire, and they all three became lessees of iron, stone, and coal mines; but were by the terms of their lease restrained from erecting particular offensive works, in consequence of the proximity of a mansion house. The works in the colliery and iron mine occasioned a demand for the use of implements of cast iron, for the purpose of carrying on the operation of smelting in an adjacent parish. In order to supply these articles, a foundry was established by the petitioner and his partners, and being unable to smelt their own ore, they were obliged to buy pig iron for casting the necessary implements; and in some few

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A lessee of an iron mine purchases large quantities of pig iron, which he manufactures into cast iron implements for the purpose of working it, and the surplus of the cast iron which he did not use, he sold to persons in the neighbourhood. *Quære*: Whether this was not a trading within the bankrupt law? At any rate, the point was so doubtful, that the Court declined to annul the fiat, on the petition of the bankrupt, but would only give him leave to try the question in an action at law

try the question in

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instances, they sold a certain portion of the iron so cast to some of their neighbours; not from ore raised by the firm from their own mine, but from what they had themselves purchased for manufacture. The mining concern ceased altogether in January 1841, and the petitioning creditor's debt was contracted in April 1841.

Mr. *Swanston*, and Mr. *Bacon*, in support of the petition. The joint adventure in this case was merely the speculation of working a mine, and did not constitute a trading; neither did the purchase of pig iron for the purpose of working the mine, or the sale of the cast iron which they did not use for that purpose, afford any stronger evidence of a trading; as the acts done were not with a view to obtain a livelihood thereby, but were merely incidental to arrangements for procuring their own produce, and making the same disposable. The petitioner being a clergyman, any trading by him, under Lord *Stowell's* act, was illegal, and his contracts not binding. It was held in well known cases relating to joint stock banks, that contracts were vitiated under similar circumstances; and though by 1 & 2 *Vict. c. 10.* the law has been altered in this respect so far as relates to the contracts of joint stock banks, it will be for the other side to show that the provisions of that act are extended to other trading partnerships.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. The statute you refer to,—after reciting that divers associations and copartnerships have been formed for the purpose of carrying on the business of banking, and divers other trades and dealings for gain and profit, and that divers spiritual persons have been and are members or share-

holders of or otherwise interested in such associations and copartnerships, and that it was expedient to render legal and valid all contracts entered into by such associations or copartnerships,—goes on to enact that no such association or copartnership already formed, or which may be formed during a certain time, nor any contract either as between the members composing such association, or as between such association and other persons, shall be deemed illegal, by reason only of any such spiritual person being a member or shareholder of such association. It does not appear to me, that the act is limited in its operation to joint stock companies, whether banks, or otherwise; and indeed, if it had been so, I should have had some difficulty in defining what did, or did not, constitute a joint stock company. The alleged vitiation therefore of any contract in this case, by reason of the petitioner being a clergyman, does not seem to be established; as the statute, known as Lord *Stowell's* act, appears to be repealed.

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Mr. *Swanston*. Without insisting upon that objection, I will confine myself to the trading; and on that point we submit, that whatever was done bearing any appearance of trading, it was merely incidental to the working of the mines, and the manufacture of pig iron into cast iron, and did not constitute a trading within the bankrupt law. [The *Chief Judge*. The *animus* of the dealing is the question.] In *Ex parte Burgess* (a), it was decided that a devisee for life, who converted the soil into bricks, and carried on the business of a brick-maker to a great extent, was not a trader within the 6 Geo. 4. c. 16., notwithstanding he bought large quantities

(a) 2 G. & J. 183.

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of ashes and straw for making the bricks. And the Court of King's Bench acted upon this principle in *Hearne v. Rogers* (a), although the bankrupt was engaged in partnership with two other persons, who had no legal or equitable interest in the land. In the present case, the parties never intended to be iron foundry; but they bought and worked pig iron incidentally, for the more effectual working of their own mine, by making the necessary implements for working it; and the selling of the surplus cast iron so worked was merely a matter of accident. It would have been very different, if, after supplying their own mine with cast iron materials, sufficient to work it, they had purchased other pig iron, for the express purpose of casting and selling it.

Mr. *J. Russell*, and Mr. *Anderdon*, in support of the fiat, were stopped by the Court.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. I do not think that this is a sufficiently clear case to warrant a supersedeas. The parties here purchased large quantities of pig iron, which they manufactured into cast iron, and sold considerable portions of it, after being so manufactured. The question certainly turns on the *animus* of the parties; and I am not altogether satisfied that the acts in question ought not to be held to constitute a trading. In such a state of circumstances, I cannot take upon myself to annul this fiat, but I am willing to give every facility for the trial of an action at law to determine the point of trading.

Mr. *Swanston* said, that his client was unfortunately not in a condition to take advantage of the course offered.

(a) 9 B. & C. 577.

The CHIEF JUDGE. The case is of so doubtful a nature, that I do not feel myself justified in superseding, nor do I think it right at present to dismiss the petition. Take a week therefore to consider the point, and if the alternative is not then accepted, and terms arranged for the trial of an action at law, let the petition be dismissed.

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Ex parte RICHARD ARKWRIGHT, PETER ARKWRIGHT, and CHARLES ARKWRIGHT.—In the matter of JOHN SMITH DAINTRY, and JOHN RYLE, and in the matter of WILLIAM RICHARD RAVENSCROFT.—

Lincoln's Inn,
January 10.

THIS was a petition of equitable mortgagees, claiming a lien on certain freehold property and policies of life assurance of the bankrupts, to the amount of 15,000*l*. It now came on, by way of rehearing, on a petition by the assignees, after having been previously heard before his Honour the late Sir *John Cross*.


The bankrupts, being mortgagees of various policies of life assurance, of which the respective insurance offices had notice, deposit them with their bankers to secure the repayment of advances; but the bankers give no notice of such deposit to the different offices. *Held*, that the policies must be considered as in the order and disposition of the bankrupts, within the 72nd section of the bankrupt act; and that the same principle ap-

The petitioners were bankers at Wirksworth, in Derbyshire, and the three bankrupts carried on the business of bankers also in copartnership at Manchester, under the firm of *Daintry, Ryle & Co*. In November 1840, *John Ryle*, on behalf of his firm, applied to the petitioners for the loan of 15,000*l*., representing that they were entitled to certain securities of the value of 35,540*l*., which he offered to deposit with the petitioners as a security for the loan, and also to give the joint promis-

pled to one of the policies, which was effected with a mutual assurance company.

A. writes word to *B*., that he has "inclosed the particulars of certain title deeds of property, which he has deposited with *B*. for the security of a debt," and in the schedule inclosed, among other entries, is the following: "9000*l*. buildings, houses &c. at *Titherington*." *A*. sends *B*. a box containing the deeds and other securities, which *B*. does not examine until after *A*.'s bankruptcy, when he finds that the only deed relating to the *Titherington* estate is an old paid off mortgage. *Held*, nevertheless, that the letter and the schedule, taken together, created an equitable charge on the *Titherington* estate.

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sory note of the bankrupts as a further security. The petitioners having agreed to the proposal, the bankrupts sent the petitioners a list or schedule of the several securities, accompanied by the following letter :

" Messrs. *Arkwright & Co.*,

" Manchester, November 10, 1840.

" Gentlemen,

" We have inclosed the particulars of certain title deeds of property, life policies, &c., which we have deposited with you, as a security for the payment of our promissory note for 15,000*l.* dated November 12, 1840.

" We are, Gentlemen,

" Your most obedient servants,

" *Daintry, Ryle & Co.*"

The list or schedule inclosed in this letter was as follows :

- | | | | |
|-------|--------------------|-------------|--|
| 1. | John Alexander |£3000.. | Brewery, Land, &c. at Pendleton. |
| 2. | Henry Alexander |2640.. | Do. Isle of Man. |
| 3. | Knight and Martin | ..3500.. | Home Land, &c. at Manchester. |
| 4. 5. | Richard Ormrod |2000.. | Ground Rents, at Manchester. |
| 6. 7. | Wilson and Bridden | ..2900.. | Land, Buildings, &c. at Stockport. |
| 8. | Salters |9000.. | Buildings, Houses, &c. at Manchester and Titherington. |
| 9. | Berford |1000.. | Life policy in the Liverpool Fire and Life Office. |
| | Do. |1000.. | Do. Sun. |
| | Turner |1000.. | Do. Crown. |
| | Do. |4000.. | Do. Do. |
| 10. | Ormrod |2000.. | Do. Equitable. |
| 11. | Thelwell |2000.. | Do. Crown. |
| 12. | Hervey |1600.. | Do. Scottish Union. |

35,540"

The above list was indorsed " List of deeds, &c. deposited in a box belonging to Messrs. *R. Arkwright & Co.*, November 10, 1840." With this list, the bankrupts sent the petitioners a key of the box, which, it was alleged,

contained the above securities. On the receipt of the above list and the promissory note, the petitioners on the 12th November 1840 advanced the 15,000*l.*, and within a week afterwards received the box in which the securities were deposited. Upon opening the box, it was found to contain twelve several parcels or bundles, numbered, so as to correspond with the several numbers specified in the list, each bundle containing securities and documents relating to the several subjects mentioned under the corresponding numbers in the list.

On the 7th July 1841, a fiat issued against *John Smith Daintry* and *John Ryle*, and on the 17th July, a separate fiat against *Ravenscroft*; and by an Order of Court dated the 22nd January 1842, the proceedings under the last mentioned fiat were annexed to and formed part of the proceedings under the fiat first issued. At the date of these fiats, the bankrupts were indebted to the petitioners in the sum of 15,000*l.* so advanced by them to the bankrupts, together with interest from the time of such advance.

The petitioners stated, that they had discovered since the bankruptcies, that some of the early title deeds and other documents relating to certain parts of the property mentioned in the above list or schedule, and comprised in the security to the petitioners, were not handed over to the petitioners by the bankrupts; but that the same were in the hands of the assignees.

The prayer was for the usual declaration and directions, as in the case of an equitable mortgage; and that the assignees might be ordered to deliver to the petitioners all deeds and documents in their possession relating to the property in question.

The petition came on to be heard before the late Sir

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John Cross on the 9th June 1842, when the petitioners were declared to be equitable mortgagees of the property comprised in the deeds and securities mentioned in the above list or schedule, and also of the policies of assurance and other securities mentioned in such list, subject to any lien upon the title deeds, which the assignees might have acquired by the payment of any money to Messrs. *Atkinson, Birch and Saunders*, or Messrs. *Edge and Parker*, in discharge of any lien upon such title deeds; and it was referred to the Commissioners to take the usual account of what was due to the petitioners for principal and interest, and to enquire whether any sums had been paid by the assignees in discharge of any previous lien on the title deeds; and it was ordered that the estate and interest of the bankrupts in the property and the policies of assurance should be sold, and the proceeds applied in the usual manner, subject to any claim of the assignees.

The assignees, who presented the petition for rehearing, now prayed that the above Order might be reversed, or be varied as the Court might think fit.

It appeared in evidence, that the bundle of deeds, numbered 8 in the list or schedule transmitted from the bankrupts to the petitioners, only included one deed relating to the Titherington property, which was an old paid off mortgage; and that at the time of the deposit, all the other title deeds relating to that property, including all the modern deeds, and the conveyances by which the bankrupts became interested in the estate, were in the possession of Messrs. *Edge and Parker*, who claimed a lien on them for the payment of their law charges; and that the assignees had, after the bankruptcy, obtained possession of such deeds by satisfying such lien.

It was also in evidence, that the bundles, numbered 9, 10, 11, and 12 in the above list or schedule, comprised several policies of assurance upon the lives of various parties, which had been assigned by way of mortgage to the bankrupts; who had, upon their becoming interested in the same, given notice to the several insurance offices of the several assignments to them; and that the bankrupts had, for some time before their bankruptcy, kept up the policies by paying the premiums on them. But the petitioners never gave any notice of the deposit, under which they claimed, to any of the insurance offices, until some time after the issuing of the fiats.

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Mr. *J. Russell*, and Mr. *Little*, in support of the petition for rehearing. In this case, the bankrupts were not the owners of the policies of assurance, but had only a right to hold them, until *Turner*, and the other parties, on whose lives they were effected, had paid the respective debts, to secure which they had deposited the policies with the bankrupts. The bankrupts were simply mortgagees, or rather the pledgees, of a personal chattel. If they had no interest in the debt, what interest had they in the policy? No notice was given by any of the parties to the insurance offices in which the policies were effected; this omission, therefore, rendered the transfer of them imperfect in the event of bankruptcy. The Court of Review may have grounded its decision on the case of *Duncan v. Chamberlayne* (a), where it was held that a party, who had effected a policy of assurance with a mutual assurance company, was to be considered a partner in the company, and therefore that no formal notice was necessary to be given to the company of the deposit of the policy with a third person; as notice to

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one partner was an implied notice to all. But that principle could only apply to one of the policies in this case. It is not necessary, however, on the present occasion, to call in question the decision in that case; for the present is just the transaction, which, above all others, tends to give a false credit to a trader in his dealings with other parties; for if notice in this case had been given to the insurance offices, the credit of the bankrupts would have been gone. But no office, and no person were informed of the transaction between these two banking houses.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. If the debtor on a bond pay to the obligee the amount of the debt, without having the bond delivered up to him, could he be compelled to pay the money over again to the holder of the bond, who had not given notice to the obligor of the transfer of it? Then, if the bankrupts had the power to receive the debt due upon any one of these instruments, is it not in their order and disposition? Suppose there had been no security,—no symbol of the debt,—then it would have been quite clear that notice would have been necessary. Then is not the security for the debt a mere incident, and not material to the real question, as to the necessity of the notice?

Mr. *Russell*, and Mr. *Little*. The judgment of Sir *J. Cross* was founded upon the principle on which he acted in *Ex parte Smith*, in the matter of *Styan (a)*, namely, that the mere omission to give notice to the insurance office of the assignment by the bankrupt of a policy effected on his life, is not, of itself, sufficient evidence that the bankrupt was the reputed owner of the policy, within the meaning of the 72d section of the 6

Geo. 4. c. 16. But in the present case there was something more than a mere omission to give notice; for the bankrupt, full six months after the policies were deposited with *Arkwright & Co.*, continued to pay the premiums on the several sums insured. They were therefore recognized by the office as the reputed owners of the policies. With respect to that part of the Order of the Court of Review, which orders that the policies of assurance should be sold, we submit that the policies cannot be sold, without a great sacrifice of property. The interest of the bankrupts in these policies amounted to nothing but an abstract indefinite right, upon which no proper value could be put. These policies do not come within the terms of Lord *Rosslyn's* Order, directing a sale of premises mortgaged by the bankrupt.

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The CHIEF JUDGE. There is no doubt but that a mortgagee can sell such interest as he has. If I find the mortgagee coming here and submitting to the jurisdiction, do I want Lord *Rosslyn's* Order?

Mr. *Russell*, and Mr. *Little*. We merely use this as an argument against the lien. With respect to the lien claimed by Messrs. *Arkwright & Co.* on the Titherington estate, the bankrupts were the absolute owners of that property, having paid off the mortgage that had been created upon that estate, and having the mortgage deed in their possession, which had become inoperative and satisfied. In the letter of the 10th November 1840, in which the bankrupts informed Messrs. *Arkwright & Co.* that they had deposited with them the title deeds relating to the Titherington estate, no other title deed relating to that property was sent to them, except the paid-off mortgage deed already mentioned.

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The CHIEF JUDGE. Does it not amount to a question of representation and contract? Are not the letter and the schedule, taken together, to be considered an agreement to create a mortgage on the Titherington estate? The schedule is certainly not to be treated as a mere schedule of deeds; it is more a schedule of property.

Mr. *Russell*. The whole transaction here is a mere deposit, and a memorandum stating the purpose of deposit; and the deposit of this paid-off mortgage deed would give *Arkwright & Co.* no lien whatever on the estate. In *Ex parte Pearce(a)*, where the bankrupt agreed with *A.* to execute a mortgage of certain premises for the security of a debt, and he sent him all the title deeds, except the immediate conveyance to himself, which last the bankrupt deposited with another person as a security for a debt; it was held by Lord *Eldon*, that neither of these parties had, separately or collectively, an equitable mortgage upon the property.

The CHIEF JUDGE. The decision in *Hodges v. Horsfall(b)* shuts you out, I think, of any objection under the Statute of Frauds. There, you know, it was held that where a written agreement refers specifically to a plan, if there be clear and satisfactory parol evidence to identify it, it is admissible for that purpose.

Mr. *Russell*. The question resolves itself to this: suppose the satisfied mortgage had been alone deposited, without any written memorandum, could it have given any title to the party with whom it was deposited? Then, does the memorandum carry the case further?

(a) Buck, 525.

(b) 1 Russ. & M. 116.

The CHIEF JUDGE. Does not the memorandum, though in the past tense, amount to an agreement to make an effectual deposit? A deposit of part of the title deeds, where there is evidence in writing that the object is to create a security upon the whole, will create an equitable mortgage upon the whole estate; as was held in *Ex parte Wetherell* (a).

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Mr. *Russell*. There is a distinction between that case and this. There the title deeds of one-half the estate were deposited; while here not a single deed, that has any operation whatever upon the Titherington estate, was sent to *Arkwright & Co.*

The CHIEF JUDGE. According to my construction of the letter of the 10th November 1840, and of the schedule, taken together, they appear to me, at present, to amount to an equitable charge on the Titherington estate. And I think also, that there is no valid objection as to the form of the Order relating to the sale of the policies of assurance. If I do not mention these points again, you may take it for granted that I still hold that opinion. The counsel for the petitioners, therefore, may confine themselves to the question, whether it was necessary to give notice to the insurance offices of the deposit of the policies.

Mr. *Swanston*, Mr. *Anderdon*, and Mr. *Bacon*, for the petitioners, Messrs. *Arkwright & Co.* In regard to the observation made by the other side, that the bankrupts continued to pay the premium on the policies, there is no force in that observation; for the form of the receipt

(a) 11 Ves. 398.

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given by the office refers to the number of the policy, and not to the person who pays the premium. We admit, that there are some decisions inconsistent with the point we are now contending for; but we submit, that the present case is unembarrassed by those decisions. Here *Daintry* and *Ryle* did not themselves effect these policies, they were no parties to the policies, but they had merely an interest, by way of mortgage, in them, to secure a debt of their own. The cases referred to by the other side were cases between the assurer and the assured, and did not relate to the intermediate rights of the assignee of a policy. It has been determined, that where a bankrupt executed an assignment of a mortgage debt, but without making any actual assignment of the mortgage itself, or the mortgaged property, the assignee of the debt became nevertheless the equitable mortgagee of the mortgaged property; *Ex parte Smith, re Mannings* (a). [The *Chief Judge*. Suppose *Daintry* and *Ryle* had assigned *Turner's* debt, to secure which one of the policies was affected, what then?] That would not have prejudiced the right of *Arkwright & Co.* to retain the policy. [The *Chief Judge*. Suppose that *Turner* had paid the debt to *Daintry* and *Ryle*, what would have then been the rights of *Arkwright & Co.*?] That would have been a fraud on the part of *Daintry & Co.*, and would not have prejudiced the *Arkwrights*. It is not because a party has the power to commit a fraud in the disposal or receipt of property, that he is to be considered the reputed owner of it. [The *Chief Judge*. In *Matthews v. Wallwyn* (b) Lord *Loughborough* observes in one part of his judgment, that no conveyancer of established practice would recommend it as a good

(a) 2 Dea. & Ch. 271.

(b) 4 Ves. 118, 127,

title to take an assignment of a mortgage, without making the mortgagor a party, and being satisfied that the money was really due. All that I mean by my previous remarks is, that if this transaction had been like that, it would have been open to material observation.] Here *Arkwright & Co.* were the assignees of the policy, the value of which would be, of course, to be measured by the amount of the debt due from *Turner*. The present case is distinguishable from any other that has come before the Court; inasmuch as the policies here were not in the names of the bankrupts, who were only the mortgagees of the policies. In *Ryall v. Rowles* (a) Lord Chief Baron *Parker* says in his judgment, that in case of bonds assigned, they must be delivered, and such delivery of the bond, on notice of the assignment, will be equivalent to delivery of goods; for the debtor cannot afterwards justify payment to the assignor. There is a case, however, in *West's Reports of Cases* in the time of Lord *Hardwicke* (b), in which it appeared to be the opinion of Lord *Hardwicke*, that notice was not necessary to be given to the debtor of the assignment of a book debt; for he says, that the objection of want of notice would be a defence indeed, if the debtor had paid the debt to the assignor, and was afterwards sued by the assignee, but that it was no defence on the part of the defendant in that case; which was a bill brought by the assignee of a debt, which had been assigned by a trader before he became bankrupt, against his assignees under the bankruptcy. [The *Chief Judge*. It is strange that Lord *Hardwicke* does not (according to this report) allude in any way to the statute of *James*; nor does the reporter give any reference to the registrar's book, which

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(a) 1 Ves. 367.

(b) *Unwin v. Grovenor*, West's Rep. 647.

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he does in the preceding and the following case.] The very point, as to the necessity of notice on the assignment of a policy of assurance, occurred in *Falkener v. Case*(a), which is in the 1st vol. of *Brown's* Chancery Cases, but of which there is a much fuller report in the judgment of Mr. Justice *Ashhurst*, in *Lempriere v. Pasley*, in the 2d vol. of the Term Reports; and Lord *Thurlow* expressly decided that notice was immaterial. This was the first case which occurred, as to the assignment of a policy of assurance, until *Williams v. Thorpe*(b). [The *Chief Judge*. Can you reconcile the decision of the Lord Chancellor in *Ex parte Tennyson*(c) with *Falkener v. Case*.] We admit that those two cases cannot be reconciled with each other.

We will now, however, submit the case in another point of view — what reputation of ownership, as to these policies, was there in *Daintry* and *Ryle*? The foundation of Sir *J. Cross's* judgment was, that reputed ownership was a question of fact, and that it lay on the assignees to prove that the bankrupts were the reputed owners of the policies; and that when the material thing, the policy, was in the hands of a third person, the possession of the instrument by such third person would rebut any inference that it remained in the order and disposition of the bankrupt, within the meaning of the bankrupt law. It was decided expressly in *Edwards v. Scott*(d), that the reputation of ownership was a question of fact; it must be proved, therefore, like other facts, and cannot be inferred.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. It is

(a) 1 Brown, 126; 2 T. R. 491.

(b) 2 Sim. 257.

(c) Mont. & B. 67.

(d) 1 Man. & Gr. 962.

material to consider, whether the case of *Loveridge v. Cooper*(a) did not establish a new rule as to notice in the priority of equities. There, a person, having a beneficial interest in a sum of money invested in the names of trustees, assigned it for valuable consideration to *A.*, but no notice of the assignment was given to the trustees; afterwards the same person proposed to sell his interest to *B.*; and *B.*, having made inquiry of the trustees as to the nature of the vendor's title, and the amount of his interest, and receiving no intimation of the existence of any prior incumbrance, completed the purchase, and gave the trustees notice; and it was held, that *B.* had a better equity than *A.* to the possession of the fund, and that the assignment to *B.*, though posterior in date, was to be preferred to the assignment to *A.*

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Mr. *Swanston*, Mr. *Anderdon*, and Mr. *Bacon*. There is a distinction between a common money bond and a policy of assurance; in the latter case there is nothing but a special contract to pay something on a certain event. The principle contended for on the other side would lead to the inference, that the books of an insurance company are as open to the inspection of the public, as the books of the Bank of England. In the former hearing, Sir *J. Cross* said that he was bound by the words of the statute(b); and that when the assignees of a bankrupt claim property under these circumstances, they must prove, not only that the bankrupt had the possession, order, or disposition of the property, but that he was also the *reputed owner* of it. Now, can any person be reputed by an insurance office to be the

(a) 3 Russ. 1.

(b) 6 Geo. 4. c. 16. s. 72.

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owner of a policy, except by the production of the policy itself? *Daintry* and *Ryle* were not the original assurers on any of the policies. Is the mere fact, therefore, of their paying the premium on the insurance, which the office would receive from any one, enough of itself to make them the reputed owners? One of the policies here was in the Equitable Office, which is a mutual assurance company; and that would therefore fall within the principle of *Duncan v. Chamberlayne*(a), which decided, that notice to one of the shareholders is notice to all.

VICE-CHANCELLOR KNIGHT BRUCE, C.J. As my judgment in this case may probably be brought under the review of the Lord Chancellor, I think it right not to defer the expression of my opinion on the points which have been now argued before me; and, for the same reason, I omitted to adjourn the rehearing with a view to obtain the assistance of Sir *George Ross*. In this case, certain debtors to the bankrupts, holding, as absolute owners, certain policies of life assurance, partly by original title, and partly by assignment, mortgaged them to the bankrupts as a security for the debts due, and delivered to the bankrupts the policies and the assignment or assignments of them accordingly; and the bankrupts shortly after such delivery duly gave notice of the transfer to the several insurance offices. The bankrupts afterwards mortgaged these policies to Messrs. *Arkwright & Co.*, and delivered to them as such mortgagees the policies and the assignments of them; but no notice of this transaction was given to any of the insurance offices, or to either of the debtors to the bankrupts, or, in fact, to any third person, before the issuing

(a) 11 Sim. 123.

of the fiat. Under these circumstances, whatever may have been decided in the last century by judges of how-ever high authority, I could not, as I conceive, give effect to the alleged title of Messrs. *Arkwright & Co.* to these policies, without acting in spirit, if not both in letter and spirit, against a series of decisions pronounced by judges of high authority during the present century, of whom the present Lord Chancellor is one; the point of these decisions, which have never been overruled, being to this effect, that when a debt due to a trader is assigned by him, it remains, notwithstanding such assignment, in his order and disposition, in the event of bankruptcy, if nothing more is done to give publicity to the assignment, than the mere delivery of the instrument creating the debt. Where the fact of the assignment of the debt is not known to the debtor,—to whom various reasons may be given by his creditor for the non-pro-duction of the instrument creating the debt, upon the application of the creditor to receive it,—it has been held, and probably for good reason, that the debt remains in the order and disposition of the original creditor. This principle applies equally to a policy of assurance, and a bond. It has been said, that, as the bankrupts were not the original assurers, but only equitable creditors, the rule does not apply, and that the petitioners were there-fore not bound to give notice to the insurance office; but the bankrupts themselves perfected their own title to the policies, by giving notice of the assignments to them to the different offices; and therefore that argument does not avail. There appears to me to be no solid distinc-tion between legal and equitable creditors. It may be remarked, also, that the debts due to the bankrupts were not assigned by them to Messrs. *Arkwright & Co.*, when

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the policies were deposited with them. But I do not lay stress on that; I lay stress on no notice having been given to the debtors, or the insurance offices. If the principle of the later decisions is to be departed from, it would be better that it should be by the decision of the Lord Chancellor; but I must be understood not to intimate any opinion in favour of such departure of principle. In regard to the policy in the Equitable Assurance Office, I think, under all the circumstances of the case, I can make no distinction; but that notice was equally necessary to be given to that office, as to the others. The former Order will be therefore varied with respect to the policies; and so much of the original petition as relates to them must be dismissed with costs; and so much of the petition for rehearing as relates to the Titherington estate must also be dismissed; but no costs on either side, as to the petition for rehearing.



Ex parte WILLIAM SMITH, one of the public officers of the Bank of Manchester.—In the matter of JOSEPH RALEIGH, THOMAS SMITH GOODE, and WILLIAM HOLLAND.—

Westminster,  
January 10, 13,  
14 and 30.

A joint creditor of A. and B. strikes a docket for a separate fiat against A., and after the docket is struck, A. delivers to

THIS was a petition for the proof of a debt, which had been rejected by the Commissioners.

The petition stated, that the three bankrupts for some time previously to the issuing of the separate fiat against him certain bills of exchange, forming a portion of the joint estate of A. and B., in part satisfaction of his debt. *Held*, that the creditor did not thereby incur a forfeiture of his debt, under the 6 Geo. 4. c. 16. s. 8., and that the words of that section, "whereby such person may receive more in the pound than the other creditors," mean the creditors entitled to receive dividends under the particular bankruptcy; and that the property, to the payment, gift, or delivery of which the section is meant to relate, is property which forms a subject of distribution under the particular fiat.



*Raleigh*, which was issued by the Bank of Manchester on the 5th August 1842, carried on business in partnership together at Manchester, under the firm of *Joseph Raleigh & Co.* This partnership had been dissolved as to *Holland*, and at the time of the issuing of the fiat, the business was continued by *Raleigh* and *Goode*, under the same firm. *Raleigh* also, at the date of the fiat, carried on business in copartnership with *John Thorp*, as merchants at Manchester, under the firm of *John Thorp & Co.*

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On the 16th August a separate fiat was issued against *Goode*.

On the 17th August, a joint fiat was issued against *Raleigh* and *Goode*; and on the 18th August, another joint fiat against *Raleigh*, *Goode*, and *Holland*; but no fiat, except the separate fiat against *Raleigh*, was issued by the Bank of Manchester.

An Order of Court was subsequently obtained for annulling the separate fiat against *Raleigh*, the joint fiat against *Raleigh* and *Goode*, and the separate fiat against *Goode*, and for transferring the proofs and proceedings under those fiats to the joint fiat against *Raleigh*, *Goode*, and *Holland*.

On the 4th October 1842, a separate fiat was issued against *John Thorp*.

The petitioner stated, that, at the time of issuing the first fiat against *Raleigh*, *Raleigh* and *Goode* were indebted to the Bank of Manchester in the sum of 187,946*l.*, for part of which sum, viz., 20,000*l.*, the bank proved under the separate fiat against *Raleigh*; and afterwards claimed to prove the sum of 56,343*l.*, against the estate of *Raleigh* and *Goode*, under the joint fiat against *Raleigh*, *Goode*, and *Holland*.

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At the time of striking the docket against *Raleigh*, which took place on the 4th August, the firm of *John Thorp & Co.* kept a banking account with the Bank of Manchester, and the firm of *Raleigh & Co.* also at the same time kept a banking account with this bank. *Raleigh* and *Goode*, under their firm of *J. Raleigh & Co.* had, previously to the striking of the docket against *Raleigh*, accepted a bill of exchange for 879*l.* 8*s.*, drawn upon them by *Thorp & Co.*, and payable to *Thorp & Co.*, and indorsed by the latter firm to the Bank of Manchester, which bill fell due on the 6th August 1842. On the 5th August last, being the day after the docket was struck against *Raleigh*, *Raleigh* brought to the bank a bill dated the 1st August 1842 for the sum of 763*l.*, drawn by *Raleigh* and *Goode* by their partnership firm of *J. Raleigh & Co.* upon *David Ainsworth*, and accepted by him on the 5th August, and indorsed by *J. Raleigh & Co.*, in order that the same should be received and applied by the bank to meet in part the bill accepted by *Raleigh & Co.* in favour of *Thorp & Co.* This bill for 763*l.* the bank refused to receive on account of the firm of *Raleigh & Co.*, but agreed to receive it on account of the firm of *Thorp & Co.*; and accordingly the bill was indorsed by *Thorp & Co.*, and on the 5th August was paid into the bank after the hours of business, and was carried to the account of *Thorp & Co.* on the morning of the 6th August, and applied towards satisfaction of the bill for 879*l.* 8*s.*, but was never carried to the account of *Raleigh & Co.* with the bank.

No act of bankruptcy was committed by, or docket struck against, either *Goode* or *Thorp*, until after the 6th August.

The separate fiat against *Raleigh* was duly opened,

and was prosecuted by the petitioner until the appointment of assignees, and was afterwards duly prosecuted by the assignees, until the fiat was annulled.

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Evidence was gone into before the Commissioners, as to the matters above mentioned; when the Commissioners rejected the claim of the bank, on the ground that the payment into the bank of the bill of exchange for 763*l.* was a delivery by *Raleigh* of security for his debt, and that, as the docket against *Raleigh* was struck by the petitioner on behalf of the bank, the whole of the debt was forfeited, under the 8th section of the 6 *Geo.* 4. c. 16.

The prayer was, therefore, that the petitioner, on behalf of the bank, might prove against the estate of *Raleigh* and *Goode* for the amount of the debt due to the bank; that in the mean time the final examination of the bankrupt should not be passed; and that the petitioner in behalf of the bank might be at liberty to examine the bankrupts previously to their passing their final examination.

In answer to the allegations of the petition, it was stated by *Raleigh* in his affirmation, that on the 5th August, after the bank had struck the separate docket against him, he paid into the bank on the account of *J. Raleigh & Co.*, three bills of exchange, one for 61*l.* 14*s.*, drawn by *J. Raleigh & Co.* upon *J. Parkyn*; another for 25*l.* drawn by *J. Raleigh & Co.* on *J. Lowe*; and another for 763*l.*, drawn by *J. Raleigh & Co.* on *D. Ainsworth*; making together the sum of 849*l.* 14*s.*

It was stated also in *Raleigh's* affirmation, that on the 1st September, which was after the issuing of all the fiats, he directed one of his clerks to take out of the cash then in the counting-house of *J. Raleigh & Co.*, the

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sum of 15*l.*, and pay the same to the Bank of Manchester, on account of a dishonoured bill of small amount of one *Harrison*, which was then held by the bank, and had been paid to them by *J. Raleigh & Co.* But it was stated in an affidavit of *Warren*, a clerk of *Raleigh & Co.*, that on the 7th July they received by post a sum of 15*l.* from *Harrison*, in part payment of a bill for a larger amount which had been accepted by *Harrison*, and had been paid by *Raleigh & Co.* into the bank of Manchester; and that this money was not then applied by *Raleigh & Co.* in payment of the bill, but was mixed with the general cash of the firm.

Mr. *Swanston*, Mr. *Teed*, and Mr. *Dickenson*, in support of the petition.

The Commissioners have rejected this proof, on the ground that the debt was forfeited within the provision of the 6 *Geo.* 4. c. 16. s. 8., which declares, that, if any trader, liable to become bankrupt, “shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person or persons any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debt than the other creditors, such payment, gift, &c., shall be an act of bankruptcy,”—“and every person so receiving such money, gift, &c., shall forfeit his whole debt, and also repay or deliver up such money, gift, &c., or the full value thereof, to such person or persons as the Commissioners acting under such original commission, or any new commission, shall appoint for the benefit of the creditors of such bankrupt.” We submit that this section only supplied a defect of the 24th section of the 5 *Geo.*

2. c. 30., which did not provide for transactions between the striking of the docket and the issuing of the fiat, and which contained the words "*privately* have and receive more in the pound;" the word "*privately*" being omitted in the 6 Geo. 4. c. 16. s. 8., and the expression being merely "whereby such person *may receive* more in the pound." Our first proposition is, therefore, that the 8th section of the last mentioned act only applies to those cases to which the 24th section of the former act would have applied, if the word "*privately*" had been omitted. The object of the legislature in both statutes was to prevent any abuse being committed by the petitioning creditor, in issuing the commission for the mere purpose of compelling the bankrupt to pay his own debt, without any regard to the interests of the other creditors. What we now contend for is, that the 8th section of the 6 Geo. 4. c. 16. only applies to a case where the money paid by the bankrupt to the petitioning creditor is out of the bankrupt's estate alone, and not where the money is paid out of the bankrupt's estate and that of another party. In *Ex parte Paxton* (a), and *Ex parte Brown* (b), where a creditor's proof was expunged, for taking security for his debt from the bankrupt after the issuing of the commission, the bond or security was in each case taken from the bankrupt himself. The other side may possibly refer to the case of *Rose v. Main* (c) in the Common Pleas, where it was held that a bill of exchange for a portion of his debt, given by a bankrupt, after commission and before certificate, to his assignee, who was also petitioning creditor, and had proved for the residue of his debt, was void in the hands of the assignee.

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(a) 15 Ves. 461.  
(b) 15 Ves. 472.

(c) 1 Bing. N. R. 357 ; 1 Scott, 127.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J. Do not the words in the 8th section, "whereby such person may receive more in the pound in respect of his debt than the other creditors," imply, that the statute had in contemplation a bankruptcy that was to be prosecuted, instead of a bankruptcy that was to be annulled? I observe that in the report of *Rose v. Main*, in 1 *Scott*, Lord C. J. *Tindal* is made to express himself more strongly in his judgment, than in the report in *Bingham*.

Mr. *Swanston*. In *Cory v. Gertcken* (a), the transaction was a transfer of stock by the bankrupt to the petitioning creditor, in consideration of his agreeing not to prosecute the docket. And in *Ex parte Thompson* (b) the creditor was ordered to refund the amount of a debt, which he had received from the bankrupt as a consideration for superseding the commission. So in *Ex parte Gedge* (c), the forfeiture of the debt was decreed, because the petitioning creditor took bills from the bankrupt for abandoning the docket. The two last cases, however, underwent the scrutiny of Lord *Eldon* in *Ex parte Browne* (d), who thought that the decision in *Ex parte Gedge* could not be supported; for that the expression in the statute, 5 *Geo. 2. c. 30. s. 24.*, as to the forfeiture of the debt, being "after issuing of any commission," he had no right to consider a docket struck as the issuing of a commission, and that the penal consequences imposed by the legislature did not attach, unless the compromise is entered into after the issuing of a commission. There are two points of view in which the question may be considered; 1st. Where there is a mere

(a) 2 Madd. 40.

(b) 1 Ves. jun. 157.

(c) 3 Ves. 349.

(d) 15 Ves. 472.

payment to the petitioning creditor, without any thing further; 2ndly. Where the payment is in the nature of a compromise, to induce the petitioning creditor to abandon the commission.

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The CHIEF JUDGE. May not the legislature have meant, as there was so much wrong to the other creditors in the payment by the bankrupt of the petitioning creditor's debt, that no evidence of the intent of the payment should be required? But what, if the payment of the debt is by a third person, any friend of the bankrupt, for instance, will that work a forfeiture of the debt?

Mr. Swanston. Certainly not, where the payment of the debt is with the money of a third person. In *Ex parte Green*(a), where the petitioning creditors issued a commission against two persons, which they abandoned on obtaining the joint note of the bankrupts and a third person, and afterwards compelled the third person to pay the note; it was held, that this did not operate as a forfeiture of their debt. The main ground on which the Court proceeded in that case was, that the note was not paid out of the bankrupt's estate, and that the funds which ought to be divided amongst the creditors were, therefore, not diminished.

The CHIEF JUDGE. I take it, that the meaning of the word "estate," which occurs in the judgments of the judges of the Court of Review in that case, means the estate which is subject to distribution under the fiat.

(a) 1 Dea. & Ch. 230.

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That case goes much further than any thing I have said. The 8th section, however, it must be admitted, does not say, if the bankrupt, "*or any other person,*" shall pay to the party who struck the docket, but merely if *the bankrupt* shall pay.

Mr. *Swanston*. Suppose the bankruptcy goes on after the payment, what is the mischief? There is no reason for any distinction between a payment to the petitioning creditor, and a payment to any other creditor, if the commission is to go on. The only object of the act, in imposing the penalty, is to prevent a fraudulent compromise by the petitioning creditor with the bankrupt, for defeating the commission. We submit, that the 6 *Geo. 4. c. 16. s. 8.*, and the 5 *Geo. 2. c. 30. s. 24.*, being *in pari materiâ*, there is no reason for giving an interpretation to the 8th section of the one act different from the 24th section of the other act. In *Rex v. Lonsdale(a)*, Lord *Mansfield* observed, that "where there are different statutes *in pari materiâ*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other. So, in the laws concerning church leases, and those concerning bankrupts." [The *Chief Judge*. That observation applies to statutes, where one amends a former one, not where the former statute is repealed.] Notwithstanding a statute is repealed, it operates retrospectively, though not prospectively. The case of *Phillips v. Const(b)* affords a strong instance of the rule in construing acts of parliament relating to the same subject-matter. That was a case upon the Annuity Acts; and it was held, that, upon the

(a) 1 Burr. 447.

(b) 3 Russ. 267.



construction of the 17 *Geo.* 3. c. 26. s. 1., coupled with the later acts, it was not essential to the validity of the annuity, that the memorial should contain the names of the attesting witnesses at full length. There is another case, also, equally strong, upon the Stamp Acts, *Re Cholmondeley(a)*, where the question was, whether the legacy duty was payable on a particular fund, and it was decided, that, upon the construction of the 55 *Geo.* 3. c. 184., in connexion with antecedent acts made *in pari materia*, and defining what the legislature meant by the term "legacies," extending it to any gift payable out of any personal estate of which a testator has a disposing power, the legacy duty was payable upon the fund in question. The construction of the bankrupt acts, the legislature has declared, shall be favourable for creditors. The clause on this subject in the 21 *Jac.* 1. c. 19. s. 1. is rather a curious one. After a long recital of the evils occasioned by divers defects in the former statutes, it is declared, that all the former statutes made against bankrupts shall be in all things largely and beneficially construed, for the aid, help, and relief of the bankrupt's creditors. We are not aware of any other interpretation clause in any subsequent statute relating to bankrupts, until the 135th section of the 6 *Geo.* 4. c. 16., which also declares that that act shall be construed beneficially for creditors, and is plainly taken from the statute of *James*. We apprehend, therefore, that the same spirit of construction would pervade all the statutes; for the 135th section of the last act leaves the case exactly where it found it. [The *Chief Judge*. Suppose the commission is superseded, after the creditor has received from the bankrupt security for his debt,—can he in that case sue

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(a) 1 Cr. & M. 149; 3 Tyrw. 10.

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the bankrupt at law?] The case of *Davis v. Holding* (a) is an express authority that he can do so; there the petitioning creditor had taken bills of exchange from the bankrupt after the issuing of the fiat, in satisfaction of his debt; and it was held, that, although he could not sue upon the bills (b), yet if no further proceedings were taken in the bankruptcy, he might sue the bankrupt for the original debt. Lord *Denman*, in delivering the judgment of the Court in that case, says, "It appears to us, that the legislature clearly contemplated the case of the proceedings in bankruptcy being prosecuted, and in that case, the double benefit of withdrawing from the general body of claimants, in respect of that particular debt, the creditor offending against the statute, and also of making him refund the money paid, or deliver up the security given unlawfully in respect of it. The words of the section all point to this; and the forfeiture of the debt appears so coupled with the repayment of the money, or the delivering up of securities, that where neither of these can be done, as in this case, the words of forfeiture do not apply." It is plain, therefore, from this decision, that the forfeiture of the debt, under the provisions of the 8th section, is only intended to apply, as between the petitioning creditor and the other creditors of the bankrupt, under a commission or fiat in bankruptcy which is prosecuted.

We will now call the attention of the Court to some circumstances not stated in the petition, but which are deposed to in the different affidavits. No act of bankruptcy was committed by *Goode* before the 15th of August; and it does not appear that the Bank of Man-

(a) 11 Ad. & E. 710.

(b) See S. C. 1 Mee. & W. 159; Tyrw. & G. 371.

chester were separate creditors of *Raleigh*. [The *Chief Judge*. What has been done with the three bills you obtained? I conclude if I give you relief, you will deliver them up.] We have received the larger bill, but we undertake to account for the money so received, and to give up the others.

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THE CHIEF JUDGE. As against all the separate creditors of *Raleigh*, the transaction could not be impeached; for they could not come on the joint estate, until all the joint creditors were paid. May not the word "creditors," in the 8th section, mean only such creditors as would be entitled to a distributive share of the particular estate, from which the payment is made to the petitioning creditor?

Mr. Swanston. On the 5th August, which was the date of this transaction, *Goode* had not committed an act of bankruptcy. The transaction itself was one in the ordinary course of business, and it was also a lawful transaction; for *Raleigh* was entitled to deal with the partnership property for payment of a debt. In *Whitehead v. Hughes* (a), it was held, that a solvent partner may sue a joint debtor in the joint names of himself and the assignees of his bankrupt copartner, in order to recover a debt due to the partnership. [The *Chief Judge*. If *Goode* had not committed an act of bankruptcy, this transaction would have been good against all the world.] *Goode* knew, on the 6th August, of the transaction that had taken place between *Raleigh* and the Bank of Manchester on the 5th August, and never objected to it, although *Thorp*, the other partner, indorsed the bill.

(a) 4 Tyrw. 92.

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If the bill that was given by *Raleigh* to the Bank of Manchester, in satisfaction of that falling due on the 6th August, is to be considered a valid transaction in the ordinary course of mercantile dealing, it cannot be held to be a fraud within the act of parliament. Suppose the money received by the bank, in this case, is to be refunded to the creditors of the party against whom the docket was struck, it would be of no benefit to *Goode's* estate; for all the money would go to *Raleigh's* creditors, in preference to those of *Goode*.

We proceed to cite a few cases, to show how strictly the Courts have construed the 8th section against the forfeiture of the debt. *Ex parte Green* (a), already mentioned, is one instance of the kind. *Ex parte Gardner* (b) is another, where a payment was made by the bankrupt to an agent of the petitioning creditor, three days after the docket was struck; but, on the agent swearing that he was ignorant that a docket had been struck, it was held that such payment did not cause a forfeiture of the debt. And in *Ex parte Nesbitt* (c), where the petitioning creditor himself had, the day after the issuing of the fiat, received a considerable portion of his debt, but it appeared that he had done so in perfect ignorance that there was any illegality in such proceeding, and he had since refunded the money, with the approbation of the Commissioners,—the Court made no Order against the petitioning creditor.

We may now refer to a supplemental case, which is intended to be set up by the other side, not meaning to make it part of our case, but merely for the purpose of explaining to the Court the way in which we propose

(a) 1 Deac. & C. 230.

(c) Mont. & Ch. 363; 4 Deac. 171.

(b) 3 Mont. & A. 46; 2 Deac. 142.

to deal with it. On the 10th August, the Bank of Manchester had an acceptance of *Conybeare & Co.* in their hands; *Conybeare & Co.* were unable to pay it when due, and sent another bill to *Raleigh and Goode*, to provide for the payment of it. [The *Chief Judge*. All that ends in nothing; it being merely an appropriation by *Conybeare & Co.* of the bill for the payment of their own acceptance, which the bankrupts could not alter.] The case, then, must be determined upon the construction of the 8th section, which refers to a payment by a trader, after a docket struck against him, to the person who struck the same, whereby such person may receive more in the pound, in respect of his debt, than the other creditors. The section evidently contemplates a case, where a portion of the bankrupt's estate has been misapplied in favour of the petitioning creditor. Then what is to be done? It is to be restored, and there is a penal visitation against the petitioning creditor. But in this case there was not a dealing with the bankrupt's estate, but with the estate of the bankrupt and another person. The *creditors*, specified in the section, must mean *creditors* who could take dividends under the fiat. The former act of 5 *Geo. 2. c. 30. s. 24.*, only applied to payments to the petitioning creditor, which took place after the commission issued; and so Lord *Eldon* construed it in the cases which have been cited. The new act of 6 *Geo. 4. c. 16. s. 8*, only applies to payments made by the trader between the docket and the issuing of the fiat; and this is clearly the opinion of Lord C. J. *Tindal*, in *Rose v. Main (a)*; for, he says, "In this section, the legislature contemplated a security given by the person

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(a) 1 Bing. N. R. 360.

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against whom a docket is struck, in the interval between the docket and the commission."

The CHIEF JUDGE, addressing the counsel for the assignees, desired them to confine their argument to the point, whether the 8th section applied to a separate fiat against *Raleigh*, where the payment was made out of the joint estate of *Raleigh* and *Goode*.

Mr. *J. Russell*, Mr. *Bacon*, and Mr. *Rolt*, for the assignees. It is quite clear that the Court has jurisdiction to enforce the repayment of this money, if it is satisfied that it is such a payment, as was within the mischief contemplated by the 8th section of the 6 *Geo. 4. c. 16.*; *Ex parte Dimmock* (a).

Before any of these transactions took place, the Bank of Manchester well knew that *Raleigh & Co.* were in a state of hopeless insolvency. We contend that what was done by *Raleigh* on the 5th August amounted to an act of bankruptcy, within the meaning of the 8th section of the 6 *Geo. 4. c. 16.* The Bank of Manchester, being joint creditors of *Raleigh & Co.*, must be considered as creditors of *Raleigh*, within the meaning of that section. If there had been no joint estate of *Raleigh* and *Goode*, it is quite clear that their joint creditors could have proved under a separate fiat against *Raleigh*. But the payment in question may operate to the prejudice of the separate creditors of *Raleigh*. Suppose there was a surplus of the joint estate, that surplus would be carried over to the separate estate of *Raleigh*, and be

(a) 2 G. & J. 261. But see *Ex parte Marshall*, 2 G. & J. 265, the Order made in which, however, does not bear out to the full extent the position in the marginal abstract.

divided amongst his separate creditors; but by this payment to the Bank of Manchester that surplus would be diminished, and the separate creditors of *Raleigh* would receive so much less. In such case, therefore, the bank would receive more in the pound, in respect of their debt, than the other separate creditors.

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The CHIEF JUDGE. *More* of what? *More* is a relative term. Does it mean *more* of the estate, out of which the other creditors are entitled to receive dividends in respect of their debts, or *more* out of that estate and some other estate, from which last they could not receive any dividend. Do you contend that the word "more" means *more* out of the fund in which the bankrupt has any interest, total or partial? The section says, that the money shall be repaid to such persons as the Commissioners shall appoint, for the benefit of the bankrupt. Then it must be money, or property, which could be so applied.

Mr. *Russell*, Mr. *Bacon*, and Mr. *Rolt*. Although the word "more" may be a relative term, the correlative is *quantity*, not *estate*. The joint property of *Raleigh* and *Goode* is certainly property in which *Raleigh* had an interest. It is, in fact, his property. The statute comprehends all property in which no person had an adverse interest to the bankrupt. If the bankrupt has any interest in property, either separate or joint, the delivering of this property may operate to the injury of his creditors. The statute means, whereby any creditor *may by any possibility* receive more than the other creditors. Suppose there was no other joint estate of *Raleigh* and *Goode* than the bill for 763*l.*, which was given by *Raleigh* in part discharge of the other bill for 879*l.* 8*s.*;

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the joint creditors could then prove against the separate estate of *Raleigh*; and, consequently, the receiving of this bill for 763*l.* by the Bank of Manchester would be to the prejudice of the separate creditors. The whole section contemplates any possibility, by which the creditors may be injured. If any part of the property, joint or separate, is withdrawn from the administration of it in bankruptcy under the separate fiat, it is enough to say, that it may have the result of injuring the separate creditors. The meaning of the eighth section is, that where any creditor strikes a docket against a trader, he must trust entirely to the fiat to be issued upon it, and have no dealings whatever with the bankrupt with respect to his debt; and it makes no difference, whether the bankrupt is solely, or partially, interested in the property. What is here complained of is the very thing which it was the intention of the legislature to prevent. The bill for 879*l.* 8*s.*, in respect of which the bill for 763*l.* was given, was one of several accommodation bills drawn for the relief of *Raleigh & Co.* It is expressly stated, also, in the affidavit of *Warren*, that 15*l.* was paid by *Raleigh* and *Goode* to the Bank of Manchester, after the joint fiat issued against *Raleigh* and *Goode*. [The *Chief Judge*. But it appears that the Bank of Manchester were never petitioning creditors against *Goode*; therefore that blunts the point of the observation.] The Bank of Manchester, were, as petitioning creditors against *Raleigh*, trustees for all purposes and for all creditors. For six months previous to striking the docket against *Raleigh*, the Bank of Manchester had kept *Raleigh* and *Goode* afloat for their own ends, by discounting accommodation bills for them; and we have a right to assert that the whole conduct of the bank in its

transactions with *Raleigh* and *Goode* was a fraud on the law of bankruptcy. It may be a hard case on the Bank of Manchester to have incurred the forfeiture of their whole debt by this proceeding ; but it was equally a hard case in *Ex parte Brine*,^(a) where, although Lord *Eldon* said that he firmly believed that the parties who were engaged in that transaction were ignorant of the legal consequences attending the payment of a petitioning creditor's debt by the bankrupt, yet that the statute was imperative, and that he must declare the debt to be forfeited. The object of the eighth section is not so much to prevent the stopping of the fiat, as to prevent any tampering of the petitioning creditor with the bankrupt. The intent was to crush the mischief in its origin. The preamble of the 24th section of the former statute of 5 *Geo. 2.* c. 30. says, that commissions of bankrupt are frequently taken out by persons, who, on promise not to execute the same, not only extort from the bankrupts their whole debts, or much greater part thereof than such bankrupts pay to their creditors, but who " otherwise get from such bankrupts goods, or other real or personal security," which is contrary to the true intent and meaning of the bankrupt laws. The actual mischief that might be occasioned was immaterial ; the object was to prevent anything that might lead to mischief. The question here, however, is one entirely as to the construction of the 8th section of the subsequent act of 6 *Geo. 4.* c. 16., and there is no authority perhaps that is wholly binding on the Court ; for there is no case that bears on the point but *Rose v. Main*,^(b) and *Ex parte Green*,^(c) and you may set off one of these cases against the other.

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^(a) *Back*, 19, 108.

^(c) 1 *Deac. & C.* 230.

^(b) 1 *Bing. N. C.* 457.

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The words of the 8th section are, if any trader shall, after a docket struck, "pay to the person or persons who struck the same, or any of them, money, &c." "whereby such person may receive more in the pound in respect of his debt than the other creditors." The other side contend, that the payment of the money, as thus expressed in the section, means payment out of a *particular fund*, and that the word "debt" means a *particular species* of debt, and that the word "creditors" means a *particular class* of creditors. But you must give general effect to general words, whether they are in a penal or remedial statute. The other side wish to limit the construction of the act—we only contend for the general construction of general words. What right have they, from the words of this section, to limit the meaning of the word "pay" to a payment out of the separate estate, or a payment out of the estate to be administered under the fiat? But, granting that the payment is to be limited to the estate which is to be administered under the fiat, the joint estate is liable in various ways to be so administered. We have already alluded to the probability of there being a surplus of the joint estate, which affords one instance of the administration of the joint estate under a separate fiat. But suppose there were two separate fiats in prosecution, one against *Goode*, as well as the one against *Raleigh*,—in that case, the whole joint estate would have to be administered under one or the other of these two fiats. Suppose again, that a trader, against whom a separate fiat issued, had a solvent partner, who afterwards absconded, or became insolvent,—in that case, also, the joint estate would be administered under the separate fiat.

As to the meaning of the word "creditors," if that

word is to be limited in its interpretation, we say that it means creditors who would be entitled to prove under the fiat,—or even, we are willing to take it, who are entitled to prove for the purpose of receiving dividends. For the 62nd section of the 6 *Geo.* 4. c. 16. enables joint creditors to prove under a separate fiat for the purpose of receiving dividends, when all the separate creditors have received the full amount of their debts.

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As to that part of the 8th section, which declares that the petitioning creditor so receiving such money shall forfeit his whole debt,—the debt will be forfeited, if he is excluded from proving. That construction therefore will work no injustice. Then, as to repaying the money received by the petitioning creditor—the section does not say that the money is to be repaid to the assignees, or to any particular person, but to such persons as the Commissioners acting under the original commission, or any new commission, shall appoint, for the benefit of the creditors of the bankrupt. These words, therefore, do not hamper the Commissioners, for they do not designate the person who is to receive the money, but the Commissioners who are to order the payment.

Mr. *Swanston*, in reply. It is stated by Lord *Henley*(*a*), who drew the 6 *Geo.* 4. c. 16., that the 8th section of that act, is taken from the 24th section of the 5 *Geo.* 2. c. 30., which last mentioned clause he says was very obscurely penned, and did not fully reach the evil which it was intended to repress. This shows that the two sections must be considered as enactments *in pari materiâ*. As to the payment of the 15*l.* to the Bank of Manchester on the 1st of September, we contend that there had been

(*a*) *Eden on Bankruptcy*, p. 36.

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a previous appropriation of that sum to the payment of *Harrison's* bill. It is expressly stated in *Warren's* affidavit, that so far back as the 7th of July, *Harrison* remitted to *Raleigh & Co.* the sum of 15*l.*, for the very purpose of being applied towards the payment of this bill. The payment therefore of the 15*l.* by *Raleigh & Co.* to the Bank of Manchester amounted to nothing more than a payment of so much of *Harrison's* debt. This payment too was after the joint fiat had issued against *Raleigh* and *Goode*. But the Bank of Manchester were not petitioning creditors under the joint fiat, or under any fiat against *Goode*.

The main point, however, is, whether a payment out of the joint estate to a petitioning creditor under a separate fiat is within the meaning of the 8th section of the statute. As to the argument urged by the other side, that the Commissioners might order the money to be repaid to the assignees under the separate fiat, the act appears to have contemplated that there were no assignees to receive it, and therefore enacts that the party shall repay it to such persons as the Commissioners shall appoint. [The *Chief Judge*. If that argument is correct, it would follow that the choice of assignees is the utmost limit of the time, before which the payment is to take place. What could the petitioning creditor do, as to stopping the progress of the fiat, after the choice of assignees?] I apprehend, that the act to be done must be clearly the act of *the* bankrupt, against whom the fiat is issued, and of him alone; and the payment intended by the statute must be out of that fund, which is divisible amongst the creditors having claims upon such fund. The money is, in fact, to be paid back for the benefit of those creditors. [The *Chief Judge*. It is contended by the counsel for the assignees, that the statute, in directing

the money to be repaid "for the benefit of the creditors of such bankrupt," meant any of the creditors of the bankrupt according to their rank and order.] The assignees under a separate fiat cannot take the joint estate, as joint estate. They cannot deal with it any manner whatever. They can only take certain proceedings to get the benefit of the joint estate. The Court will in the present case determine the character of the transaction, by the time of the transaction; and will not therefore decide upon its legality or illegality, by reference to a subsequent fiat issued in September or October by another petitioning creditor. The question is here, whether at the time of the transaction, there was, in fact, a contravention of the 8th section of the act of parliament, when no joint creditor but the petitioning creditor could prove for the purpose of receiving dividends. The word "creditors" in the section must mean the individuals, who were to receive dividends under the fiat.

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Cur. adv. vult.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. The question on this petition, presented on the part of the Bank of Manchester, under a fiat in prosecution against *Joseph Raleigh, Thomas Smith Goode, and William Holland*, is, whether the Bank of Manchester is a joint creditor of *Joseph Raleigh and Thomas Smith Goode*, having a debt proveable against the joint estate of those two persons. The Commissioners have decided against the right of the Bank of Manchester to prove. They have done so, on the ground that the debt has, by virtue of the statute of the 6 Geo. 4. c. 16. s. 8., become forfeited; and the point to be now determined, on appeal from their judgment, is, whether such a forfeiture has taken place. The three bankrupts having for some time traded in

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partnership together, and having dissolved their partnership, the business was after the dissolution carried on by *Raleigh* and *Goode*, who subsequently traded as partners together at Manchester, and in that capacity acquired property and incurred debts, particularly to the Bank of Manchester, the largest creditors of *Raleigh* and *Goode*.

Raleigh was also engaged in other partnership concerns, with which neither *Holland*, nor *Goode*, had any thing to do.

Raleigh and *Goode*, having become embarrassed and fallen into difficulties, appear to have been for some time prevented from a stoppage by the assistance of the Bank of Manchester. This assistance was at last withheld; and the Bank of Manchester was desirous that *Raleigh* and *Goode* should commit acts of bankruptcy, with a view to a fiat being issued against them. To this, shortly before the 2nd August 1842, *Raleigh* acceded, but *Goode* objected. On the 2nd or 3rd August 1842, *Raleigh* committed an act of bankruptcy. On the 4th August a docket was struck against him separately by the Bank of Manchester; and on this docket a fiat was issued against him on the 5th August, under which he was adjudged a bankrupt on the 10th August. The choice of assignees under it took place on the 29th of August.

The Bank of Manchester appears early in August, (before the 5th), to have taken steps for compelling *Goode* also to commit an act of bankruptcy; but, before that object had been effected, a docket was struck against *Goode*, separately, on the 13th of August. He appears to have committed an act of bankruptcy on the 15th of August. And, on the whole, I think that I cannot consider him to have committed an act of bankruptcy before that day. He suggests that he did so. But the sugges-

tion is vague, general, and not in my opinion to be deemed of any weight or account in the case. A fiat upon the docket of the 13th appears to have issued against *Goode* on the 16th, under which he appears to have been adjudged a bankrupt on the 29th of August.

A fiat against *Raleigh* and *Goode* jointly issued on the 17th of August; and the present fiat against the three bankrupts jointly, issued on the 18th of August, under which the adjudication took place on the 31st of August.

On the 1st and 3rd of October, the fiat against *Raleigh* separately, the fiat against *Goode* separately, and the fiat against *Raleigh* and *Goode* jointly, were annulled in the usual manner in favour of the now subsisting fiat against *Raleigh*, *Goode*, and *Holland*, under which the assignee who now is was chosen.

The Bank of Manchester had not struck, or joined in striking, either of the dockets, except that against *Raleigh*, solely. They were therefore petitioning creditors only with reference to the fiat of the 5th of August. It appears, that on the 5th of August, on the 1st of September, and also in the interval between those two days, and particularly on the 9th of August, certain bills and money were delivered and paid by *Raleigh* to the Bank of Manchester, on account and in payment *pro tanto* of the debt due to the Bank of Manchester from *Raleigh* and *Goode* jointly. These bills and money were part of the joint estate of *Raleigh* and *Goode*. They belonged entirely to that joint estate, but did not form the whole of it, inasmuch as there is besides joint estate of *Raleigh* and *Goode*, to the amount of several thousand pounds, available and to be administered under the fiat now in prosecution. The Bank of Manchester is (subject however, of course to the question now to be decided), a joint

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creditor of *Raleigh* and *Goode*, to the amount of many thousand pounds, besides and independently of the amount of the bills and money delivered and paid as already mentioned. There are also other joint creditors of *Raleigh* and *Goode*.

It is under these circumstances, that the question, whether there is a case of forfeiture under the 6 Geo. 4. c. 16. s. 8, arises. It is, in the first place, obvious from the facts, that, with the exception of the Bank of Manchester, no joint creditor of *Raleigh* and *Goode* was ever entitled to prove, or can prove, or if the fiat against *Raleigh* separately had not been annulled or superseded, could prove, for the purpose of receiving a dividend from the separate estate of *Raleigh*, in competition with his separate creditors. It is equally clear, that the joint estate of *Raleigh* and *Goode* was and is applicable, in the first place, to the payment of the joint debts of *Raleigh* and *Goode*, and that *Goode*, and his estate, having been materially interested in the administration of the joint estate of *Raleigh* and *Goode*, that joint estate was incapable of being administered under the fiat against *Raleigh* separately; although it is true that some share of the surplus, if any, of their joint estate, after paying their joint creditors 20s. in the pound, might and may have to be carried to the account of the separate estate of *Raleigh*, for the benefit of his separate creditors; and although it is as true, that by means, not of the fiat against *Raleigh* separately, but by means of some agreement or consent or judicial proceeding, the joint estate of *Raleigh* and *Goode* might have fallen to be administered under that fiat. But there has never, in fact, been any such agreement or consent, or judicial proceeding; and

the assignees under that fiat never had the power of administering, distributing, or applying the joint estate.

The 8th section of the statute of 6 Geo. 4. c. 16. enacts, that every person receiving any money, gift, delivery, satisfaction, or security, within its provisions, shall repay or deliver up such money, gift, satisfaction, or security, or the full value thereof, to such person or persons as the Commissioners acting under the original commission, or any new commission, shall appoint, "for the benefit of the creditors of such bankrupt." The context, whether of this section only, or of the whole act, shows, I think, that by the word "creditors" here are meant the creditors seeking relief, that is, the creditors entitled to receive dividends under the bankruptcy, in the ordinary and common way. The creditors entitled to receive dividends under the separate fiat against *Raleigh* in the ordinary and common way could, of course, only be *Raleigh's* separate creditors. But it is plain, that, to devote the joint estate of *Raleigh* and *Goode* to the benefit of the separate creditors of *Raleigh*, without the consent of *Goode*, or of those representing his estate, or of the joint creditors, would be unjust and absurd. The bills and money in question never were, and if not delivered or paid to the Bank of Manchester could never have been, applicable for the benefit of *Raleigh's* separate creditors, or capable of administration under the separate fiat against him. And therefore it cannot, I conceive, be a reasonable construction of the statute, to say, that the 8th section applies in the present case.

It has been said in favour of the respondent's view, that separate creditors are entitled to the benefit of a surplus from the joint estate,—that joint creditors are entitled to the benefit of a surplus from the separate

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estate,—that the words, “such person or persons as the Commissioners shall appoint,” may well be contended to be used by way of purposed distinction from the assignees, and to point to an administration different from that by the assignees,—and that the word “creditors” in the last line of the section may well be read, as meaning those creditors, who according to established rights and usages would be entitled, and therefore (in case of joint property) joint creditors, though there be but a single bankrupt. For reasons to which I have already referred, I cannot agree to the respondent’s view of the section. It is plain, that, independently of any other difficulty, the interpretation of the word “creditors,” which he desires, would not make the operation of the section for which he contends reasonable, against the partners, not the objects of the fiat, or those representing their estates, who are entitled clearly to a voice and participation, at least, in the administration of the joint estate, where not excluded by judicial proceedings, or by agreement, or consent.

The argument upon the words, “such persons as the Commissioners shall appoint,” is more ingenious, than to my mind convincing or weighty, whether the legislature in using them ought, or ought not, to be held as contemplating a case where there is no assignee. It may be argued, that the section is divisible in its construction,—that the provision for forfeiture is complete in itself, and ought not to be explained or affected by what follows,—that the section may well be read, as if at the end of it there were words saving the right of all persons, other than the petitioning creditor and the bankrupt, or words having that effect,—and that cases within the mischief, against which the section is contended or conceded by

the petitioner to have been intended to guard, will, upon my interpretation of the clause, be exempt from its operations. These considerations, which seem not unworthy of attention, I have weighed in my mind; but I remain, notwithstanding, impressed, as I have said, with the belief, that the property, to the payment, gift, or delivery of which the section was meant to relate, must be property, which otherwise (assuming the validity and prosecution of the docket and the fiat under it) would form a subject of administration and distribution under the fiat, by virtue of the fiat. Nor am I able to see, how property, of which the bankrupt was neither the true owner, nor the reputed owner with the consent of the true owner, could be property, whereby more in the pound might be received by the petitioning creditor in respect of his debt, as mentioned in the section. And with regard to the mischief that has been mentioned, cases within it may be easily suggested, which would seem, not in my view of the section, to be touched by it. As, suppose a valuable service performed, or to be performed, by the bankrupt, or a transaction otherwise implicating the bankrupt, where an agreement for suspending or abandoning proceedings is included, but there is neither a payment of money, nor any satisfaction or security for the debt, or any part of it,—or suppose, as another instance, money paid to the same intent by a friend of the bankrupt, the bankrupt or his property not being implicated. Nor must it be forgotten, that the invalidity of agreements of a corrupt nature, or contrary to the policy of the law, is secured otherwise than by this section.

Placing my decision against the respondent on the ground that I have stated, I leave undecided and un-

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touched some points which have been raised in the argument. I do not decide, whether the 8th section, according to its true construction, can, or cannot, apply in a case where (as, in truth, in the present case) there has not been any composition, compromise, abandonment, or suspension of the fiat, or of proceedings under it, or any bargain or promise for such a purpose. Nor do I decide, whether from the time of the fiat, or at what state or period after the fiat, a payment or delivery, within the meaning of the 8th section, becomes impossible. On neither of these questions do I express or intimate any opinion.

The ORDER of the Court is, to declare that a case of forfeiture did not arise, upon the facts in evidence before the Commissioners, or before this Court; and, with that declaration, let the petitioner, on behalf of the Bank of Manchester, be at liberty to go before the Commissioner, and tender such proof as he may be able to establish against the joint estate of *Raleigh* and *Goode*; and let there be no costs of the petition on either side. But the assignee is to be at liberty to take his costs from the joint estate of *Raleigh* and *Goode*. And the Order is to be without prejudice to any question as to the validity of the transactions of August and the 1st of September, or either of them, or as to any liability of the Bank of Manchester (otherwise than by way of forfeiture) in respect thereof.



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*Ex parte* LEWIS.—In the matter of TODHUNTER.

*Westminster,*  
*Jan. 28.*

IN this case, the usual Order had been made on the petition of a vendor, claiming a lien for unpaid purchase money in respect of four freehold houses, which he had sold to the bankrupt before the bankruptcy. A deposit had been paid, but no conveyance had been made, nor had any further step been taken in the performance of the contract when the bankruptcy occurred. The Order was in the common form, directing the sale to be conducted by the assignees, (the petitioner having liberty to bid,) and the expenses of the sale and of the proceedings incident thereto to be paid, in the first place, out of the proceeds of the sale.

An application to review the taxation of an officer of the Court, may be made by way of motion.

Assignees having the conduct of a sale, under the usual Order made on the petition of a vendor having a lien for unpaid purchase-money, are justified in taking the opinion of counsel on the conditions of sale, and the costs of so doing out of the proceeds of the sale, although those proceeds may fall short of the sums due to the vendor.

Under this Order, the premises had been put up for sale, and purchased by the petitioner, at a smaller sum than the amount of his lien.

Upon the taxation of costs, the officer had allowed a charge for fees to counsel, on settling the conditions of sale on behalf of the assignees, which was objected to on the part of the vendor, on the ground that the conditions had been prepared by his solicitor, who was perfectly cognizant of the state of the title, and that, it being quite clear that there would be no surplus, the assignees had no interest in the sale, or, at all events, no interest which their solicitor was, on a perusal of the conditions, incompetent of himself to protect; and that the vendor had expressly objected to the assignees incurring the expense of consulting counsel, before that step was taken.

Mr. *Bacon* now moved, on behalf of the vendor, for a review of the taxation.

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Mr. *Anderdon*, for the assignees, objected, that application to review the taxation of a bill of costs ought to be made on petition.

The COURT, however, held, that under 1 & 2 *Will.* 4. c. 56., the application might be by motion, provided the items objected to were set out as they were here, in the affidavit in support of the motion. But, with respect to the above-mentioned item, the Court was of opinion that the assignees were bound to make the sale as advantageous as possible, and that it was their duty to look into the title, and have the conditions of sale properly prepared; and that their solicitor, by a hasty adoption of those submitted to him, might have rendered himself liable to an action. The motion, therefore, which was also founded upon other items complained of, was refused.

Ex parte HENRY BARBER and others.—In the matter of ROWLAND EVANS, JOHN FOSTER, SKINNER ZACHARY LANGTON, and THOMAS FOSTER.—

*Lincoln's Inn,*  
*Feb. 2.*

The bankrupts employed the petitioners as their brokers, for the sale of East India produce, and the brokers accepted bills to

THIS was the petition of creditors, claiming a lien on a cargo of oil, under the following circumstances:

The bankrupts carried on the business of merchants, at London, in connexion with Bombay and other places a large amount in favour of the bankrupts, on the credit of goods deposited with them for sale, and of bills of lading for goods shipped and consigned from India to the bankrupts. On the 14th October, the bankrupts, being then in full credit, proposed to the brokers to accept bills in their favour, to the amount of 3000*l.*, and, to induce them to do so, informed them that a cargo of oil was consigned to the bankrupts from Bombay, by the ship *Majestic*, which they intended to place in the broker's hands for sale, and undertook to hand over to them the bill of lading, when received. On the 24th October, a fiat was issued against the bankrupts, and the bill of lading came to the possession of the assignees. *Held*, that the brokers were entitled to have the bill of lading delivered up to them, and had a lien upon the cargo of oil for their general balance.

in the East Indies ; and the petitioners had long been employed by them as their brokers, for the sale of East India produce. According to the arrangement of dealing between the parties, the bankrupts deposited with the petitioners goods, or bills of lading for goods, which had been shipped to them from various ports in the East Indies, in order that the petitioners might sell the same as brokers ; and the bankrupts, upon the security of such goods and bills of lading, from time to time received cash, and obtained acceptances, from the petitioners, proportionate to the expected proceeds of such goods. As the goods were received and sold by the petitioners, they credited the bankrupts with the amount of the sales, on a general running account, and debited them with all advances and liabilities made or existing for the time being. The balance on such account was always in favour of the petitioners ; and, for the security of such balance, the petitioners held all the bills of lading and goods, from time to time deposited with them in the usual course of business. On the 14th October 1842, the bankrupts, being then in full credit, informed the petitioners of their intention to place in their hands for sale a cargo of oil, which they expected shortly to receive from Bombay by the ship *Majestic*, and proposed to draw upon the petitioners bills to the amount of 3000*L*, to be carried, in the usual way, to the general account, and to assign to the petitioners such cargo of oil as a security. Upon this occasion, the bankrupts sent to the petitioners the following letter :

“ To Messrs. *Barber, Nephew, and Cobb.*

“ 14th October 1842.

“ Gentlemen,

“ We beg to inform you, that we have advice from our

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friends at Bombay, dated 26th to the 28th August, of a parcel of about 180 tons of cocoa-nut oil, being in course of shipment per *Majestic*, viâ Calicut and Cochin; the bill of lading and shipping documents of which they purpose to forward by the next mail, and which we undertake to hand to you, when received, and have in the mean time protected the oil from sea risk by insurance, the policy for which we hold at your disposal.

"We are, your obedient servants,

"*Evans, Foster, and Langton.*"

The petitioners agreed to take the cargo of oil, as security on the general account between them and the bankrupts, and thereupon accepted two bills of exchange, drawn on them by the bankrupts, one of which was for the sum of 1000*l.*, and would become due on the 16th January 1843, and the other for the sum of 2000*l.*, which would become due on the 18th January 1843. These bills they sent so accepted to the bankrupts, who thereupon wrote to them as follows:

"Messrs. *Barber, Nephew, and Cobb.*

"14th October 1842.

"We beg to acknowledge the receipt of your acceptances for 1000*l.*, due 16th January 1843, and for 2000*l.*, due 18th January 1843, as further advance in consideration of our cocoa-nut oil, per *Majestic*, made over to you by our letter of this day's date.

"We are, dear sirs, your obedient servants,

"*Evans, Foster, and Langton.*"

The petitioners, on the receipt of the policy of insurance, finding that the amount insured would not fully cover the value of the oil, or their advances on the general account, further insured the oil for the additional sum of 2000*l.*, of which they gave notice to the bankrupts,



and informed them that they should debit their account current with 40*l.*, for the premium paid for such additional insurance.

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On the 24th October 1842, a fiat was issued against the bankrupts; and, shortly after the appointment of assignees, the petitioners applied to the assignees for the bill of lading of the oil, offering to account for the proceeds, when realized; but the assignees refused to deliver up such bill of lading.

The petitioners alleged, that, upon the general account between the petitioners and the bankrupts, there was a cash balance due from the bankrupts to the petitioners of 11,938*l.* 10*s.* 9*d.*; besides which, the petitioners were liable to the further extent of 10,000*l.*, as the acceptors of various bills of exchange falling due in January and February 1843; for which several sums, making together 21,938*l.* 10*s.* 9*d.*, the petitioners alleged they had no other security than the proceeds of certain goods sold, but not due, to the amount of 5404*l.* 2*s.* 8*d.*, and various goods unsold, and the above agreement for the deposit of the bill of lading of the oil, nearly the whole whereof would be necessary to pay the amount due to the petitioners.

The prayer was, that the assignees might be ordered to deliver up to the petitioners the bill of lading of the oil, in order that the petitioners might sell it and pay themselves out of the proceeds the balance of their account, the petitioners being willing to pay over to the assignees the remainder of the proceeds of the sale, if any, and to come to any account with the assignees which the Court should think fit; or, that the petitioners might be paid the balance due to them from the estate of the bankrupts.

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Mr. *Swanston*, and Mr. *Hull*, in support of the petition, relied upon the case of *Lempriere v. Pasley* (a), where it was held that an assignment of goods at sea, as a collateral security for a debt, and a subsequent indorsement of a bill of lading, were good, as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods, and the indorsement of the bill of lading.

Mr. *J. Russell*, for the assignees, contended that the decision of the Court of King's Bench in *Carvalho v. Burn* (b) was more applicable to the facts of the present case. There *A.*, who resided at Liverpool, was in the habit of making consignments of goods to *B.*, his agent in South America, for sale; on the faith of and against which consignments *A.* drew bills proportioned to their amount, to be paid by the agent out of the proceeds; and the bills were negotiated by the indorsements of *C.*, *A.*'s correspondent in London. Some of the bills so indorsed being refused acceptance by the agent, *C.*, on receiving information of their dishonour, requested that *A.* would order his agent, in case he did not pay *A.*'s drafts, immediately to hand over to *C.*'s agent such property as he had of *A.*'s of an equivalent value to the bills that should not be paid by him, which *A.* agreed to do, but became bankrupt before his order to transfer the goods reached South America. Under these circumstances, it was held that the bargain between *A.* and *C.* did not operate as a legal or equitable assignment of the property in *A.*'s goods, held by *B.*, his agent, but that they remained the property of *A.* at this time of his bankruptcy, and passed to his assignees.

(a) 2 T. R. 485.

(b) 4 B. & Adol. 382; and see 7 Simons, 109.

Mr. *Swanston*, in reply. There is a great distinction between the case cited and the present. In that, there was no identification of the subject-matter of the contract; the agreement was merely to hand over to *C's* agent *such property as he had of A's*. But here there was an express undertaking of the bankrupt to hand over the bill of lading of 180 tons of cocoa-nut oil shipped by the *Majestic*.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—If it can be proved, that the oil and the bill of lading were dispatched from Bombay by the bankrupts' correspondent before the 24th October 1842, when the fiat issued, then I think that the bill of lading should be delivered up to the petitioners, they dealing with the proceeds, and undertaking to abide by any further Order of the Court.

Mr. *Swanston*. We claim a lien for our general balance.

Mr. *J. Russell* admitted, that, if the petitioners had any lien at all on the oil, it would be a lien for their general balance.

The CHIEF JUDGE.—Then let it be declared in the Order, that the petitioners have a lien on the cargo of cocoa-nut oil for their general balance, upon the admission of the assignees that the petitioners have a lien, if any, for their general balance (a).

(a) And see *Ex parte Copeland*, 3 D. & C. 199; *Ex parte Prescott*, Ib. 218; *Brown v. Heathcote*, 1 Atk. 160; *Halle v. Smith*, 1 Bos. & Pul. 563.

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Lincoln's Inn,
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Ex parte ALSOP.—In the matter of WISE.—

On a petition to stay the bankrupt's certificate, the Court will not grant the petitioner further time to file affidavits in reply, unless, in the course of the hearing, there appears to be just ground for granting such indulgence.

The Court will confirm the Commissioner's allowance of the certificate, under 5 & 6 Vict. c. 122, s. 39, unless it is proved, either that the bankrupt has not conformed, or that there is some real foundation for impeaching his conduct.

THIS was a petition to stay the bankrupt's certificate, until the petitioner had an opportunity of examining him before the Commissioner, as to the particulars of a settlement of some property which he had made on his wife and child.

Mr. Follett, in support of the petition, applied for permission that it might stand over, in order that the petitioner might file an affidavit in reply, in answer to that of the bankrupt.

Mr. J. Russell, for the bankrupt, objected to any further delay. No fact ought to be brought forward now, that was not before the Commissioner.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Under the old practice in bankruptcy, when a petition to stay a certificate was called on for hearing, no time was allowed to the petitioner to file affidavits in reply; but the petition was heard, subject to any Order which the Court in the course of the hearing might see just ground to make for granting further time.

Mr. Follett then said, that the bankrupt was bound to give an explanation of the settlement alluded to, and that the Commissioner declined to examine him upon the subject.

The CHIEF JUDGE.—Before I disallow a bankrupt's

certificate, I must be satisfied, either that the bankrupt has not conformed himself to the law, or that there is some foundation for impeaching his conduct as a trader either before or after his bankruptcy. In the present case, there is no distinct allegation of any misconduct on the part of the bankrupt, or of any thing fraudulent in the settlement that has been alluded to. What I am now to determine is, whether, under the provisions of the 5 & 6 Vict. c. 122, s. 39 (a), this Court is not bound to confirm the bankrupt's certificate, after it has been allowed by the Commissioner; and I have heard nothing alleged to warrant me in withholding such confirmation. The Court therefore orders the certificate to be confirmed, and that the bankrupt may be examined before the Commissioner, as to the particulars of the settlement.

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 Ex parte
 Alsop.

Mr. *Follett* then applied, that the costs of this petition should be reserved, until the result of the bankrupt's examination was known.

The CHIEF JUDGE.—There must be some case made out on your part, to warrant any Order whatever as to the costs.

Petition dismissed, with costs.

(a) See Appendix, p. xvi.



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*Lincoln's Inn,
Feb. 2.*

A. guarantees to a banking company "all current obligations in their hands, to which B. may be a party, and also all his future obligations and engagements that may come into their hands;" Held, that the latter part of the guarantee, as to the future obligations, implied of itself a consideration, and did not require the specific statement of one in the body of the guarantee, according to the requisition of the Statute of Frauds; and that the banking company might therefore, on the bankruptcy of A., prove for the amount of their advances to B., subsequent to the date of the guarantee.

Upon an objection that an instrument is not stamped, the Court will hear the petition, but subject to future order as to the stamp.

Ex parte WILLIAM LITTLEJOHN, the registered public officer of the Aberdeen Town and County Banking Company.—In the matter of ANGUS DUNCAN, and CHARLES DUNCAN.—

THIS was a petition to prove a debt alleged to be due to the above banking company, the proof of which had been rejected by the Commissioners.

The bankrupts carried on business in partnership, as merchants, in Tokenhouse Yard, London, under the firm of *Duncan, Brothers*; and, from the 8th April 1841 up to the issuing of the fiat, had extensive dealings with one *John Begg*, of Aberdeen, who had large dealings with the Aberdeen bank. On the 8th April 1841, the bankrupts sent the following letter of guarantee to the petitioner, as the manager and cashier of the Aberdeen bank.

"*Wm. Littlejohn*, Esq. Cashier of the Aberdeen Town and County Banking Company.

"Sir,—We hereby become bound to guarantee to you, as cashier and partner of the Aberdeen Town and County Banking Company, and as acting for behoof thereof, all current obligations and engagements in your hands, to which Mr. *John Begg*, merchant, Aberdeen, may be a party, and also all his future obligations and engagements that may come into your hands, as cashier aforesaid, or into the hands of your successors in office, in the course of business. This guarantee, however, to be limited to the sum of 1000*l.*, such to be a standing guarantee, and in force until recalled by us.

"We are, Sir, your obedient servants,

"*Duncan, Brothers.*"

On the faith of this guarantee, the bank discounted for *John Begg* various bills of exchange, to the amount of 998*l.* 10*s.* 5*d.*, all which bills were dishonoured, and no part of the amount paid to the bank, with the exception of a sum of 50*l.*; after giving credit for which, the bank claimed a debt of 948*l.* 10*s.* 5*d.*

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The petition alleged, that the above mentioned letter was intended by the bankrupts to be, and was understood by the bank, and by the petitioner and other officers and managers of the bank, and by *John Begg*, to be, a running and continuing guarantee to the bank, to the extent of 1000*l.*, for whatever balance might at, or any time after, the date of such letter, from time to time be owing to the bank by *John Begg*, in respect of his transactions with the bank.

Begg had a banking account with the bank, wholly distinct from the account in respect of the discount transactions; and, at the time when the fiat was issued, viz. on the 17th August 1841, a cash balance of 166*l.* stood to the credit of *Begg* in his banking account with the bank.

The bank claimed to be entitled to prove for the sum of 948*l.* 10*s.* 5*d.*, as the sum secured and covered by the above letter of guarantee; or, at all events, for the sum of 782*l.* 10*s.* 5*d.*, after deducting the cash balance owing to *Begg* on the banking account.

The petition alleged, that the consideration for the debt was money lent and advanced by the bank to *Begg*, by discounting for him sixteen bills of exchange, on the faith of the above letter of guarantee.

The Commissioner refused the proof, on the ground that there did not appear to be stated upon the face of the letter of guarantee any consideration for the same,

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LITTLEJOHN.

and that the same was consequently void, as being in contravention of the Statute of Frauds.

Mr. *Anderdon*, on behalf of the respondent, took a preliminary objection to the admissibility in evidence of the guarantee, for want of a stamp.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I will hear the petition; but, whatever Order is made by the Court, it will not be delivered until such documents are stamped, which the Court may think ought to be stamped.

Mr. *Russell*, and Mr. *Bagshawe*, in support of the petition, after stating the facts, were then stopped by the Court.

Mr. *Anderdon*, and Mr. *Beales*, for the assignees. The guarantee is void, for not stating the consideration; *Wain v. Warlters* (a). And, though in *Ex parte Gardom* (b) it was held that an undertaking in writing to guarantee the debt of another was sufficient, within the Statute of Frauds, without stating any consideration as between the creditor and the surety—yet the guarantee, in that case, was not to secure an existing debt, but the payment of any future debt for goods purchased by the party, on whose behalf the guarantee was entered into. And the doctrine laid down in *Wain v. Warlters* has been since established by *Saunders v. Wakefield* (c), and many subsequent cases.

The CHIEF JUDGE.—Where the consideration is in-

(a) 5 East, 10.

(c) 4 B. & Ald. 595.

(b) 15 Ves. 286.

volved in the contract, the consideration in such case need not be stated. If I undertake to be answerable for the payment of an existing debt, the consideration must be expressed in the undertaking. But if I agree, that, if *A.* will trust *B.* with goods, I will be answerable for *B.*, the consideration in that case need not be expressed.

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Mr. *Anderdon*. The words of this guarantee, I submit, plainly refer to an existing debt. It states, that the bankrupts "hereby become bound to guarantee to the petitioner, as cashier and partner of the Aberdeen Town and County Banking Company, all current obligations and engagements in his hands, to which Mr. *John Begg* may be a party." This undertaking is quite distinct from the guarantee for "all his future obligations and engagements." But in *Raikes v. Todd (a)*, a guarantee of the very same description was held to be bad *in toto*, for not expressing the consideration. There the undertaking was to secure "the payment of any sums you have advanced, or may hereafter advance to *D.*;" and the Court of Queen's Bench decided, that the consideration did not sufficiently appear by the written instrument.

Mr. *Russell* consented to waive any claim of the bank, prior to the date of the guarantee.

Mr. *Anderdon*, and Mr. *Beales*. The guarantee is as bad for the future, as for the past advances. In *Raikes v. Todd (a)*, Mr. Justice *Patteson* said, "If the guarantee were merely for future advances, then such future advances might be considered as the consideration for the guarantee; but that does not apply to a guarantee

(a) 8 Adol. & E. 846.

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LITTLEJOHN.

comprehending also past advances." In the subsequent case of *Haigh v. Brookes* (a), the judgment of the Court proceeded entirely on the principle, that a future advance was guaranteed, and that the words of the instrument did not necessarily imply a past advance. In the present case, the guarantee cannot be made available, because it applies to past debts, as well as to future debts. There is not sufficient certainty in this instrument to show what the consideration was.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—This is a proper case to send to a Court of Law; but, as my judgment in the matter may be brought before the Lord Chancellor, on appeal, I think it is better to act on my own opinion, than to send the case to be tried by a jury. It appears that the whole claim of the petitioner arises from bills discounted by the Aberdeen Banking Company subsequent to the guarantee, not a particle of their claim being founded on any debt existing at the date of the guarantee. By the terms of that instrument, the bankrupts became bound to guarantee to the Banking Company "all current obligations and engagements in their hands, to which Mr. *John Begg* might be a party." If the undertaking had stopped there, the objection might then apply, that the guarantee was for past advances constituting an existing debt, and therefore void for want of a consideration being expressed. But it goes on to specify "also all his future obligations and engagements that may come into the hands of the petitioner, as cashier aforesaid, or into the hands of his successors in office." All bills, therefore, which were discounted by the bank subsequently to the date of the

(a) 10 Ad. & E. 309.

guarantee, are, in my opinion, "future obligations and engagements," within the meaning of the guarantee. There may be a question, whether the law of England applies to such a contract, the obligations and engagements in question having been entered into in Scotland between Mr. *John Begg* and the Bank of Aberdeen, and the guarantee itself having been entered into by the bankrupts in England. I think that it does so apply, and therefore do not found my opinion upon the principles of the foreign law. It is said, however, that this is an agreement to pay the debt of another, which is within the provision of the Statute of Frauds (*a*). That part of the guarantee which relates to obligations and engagements *then in the hands* of the bank, may, or may not, be considered to be within the statute. But what is there to affect the residue of the guarantee, as to "future obligations and engagements?" The very mention of these appears to me to imply a consideration. I am therefore of opinion, that this part of the guarantee is not within the Statute of Frauds, and that the bank have a right to prove for the amount of the bills discounted by them since the date of the guarantee.

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ORDER as prayed.

(*a*) 29 Car. 2. c. 3. s. 4.

Ex parte CLOUTER.—In the matter of LINDON.—

Lincoln's Inn,
 Feb. 4.

THIS was a petition of the public officer of the Western Banking Company, praying that they might be declared Order, where the deposit was made only a month before the issuing of the fiat, the Court directed an inquiry, upon the request of the assignees.

On a petition of
 an equitable
 mortgagee
 for the usual

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equitable mortgagees of certain leasehold premises of the bankrupt, as a security for the sum of 800*l.*, and praying for the usual Order. It appeared that the deposit of the deeds with the bank was made only a month before the issuing of the fiat.

Mr. Anderdon, in support of the petition.

Mr. Ferrall, contra. The deposit having been made so short a time before the fiat issued, the case is pregnant with suspicion; and the Court therefore will not under these circumstances exercise its discretion, in making any Order in favour of the equitable mortgagee; *Ex parte Ainsworth (a)*. And in a subsequent case, where the deposit was made on the 16th of April, and the fiat issued on the 2nd of May, the petition of the equitable mortgagee was dismissed with costs; *Ex parte Morgan (b)*.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The assignees here file no affidavit; they state no evidence; they allege no fraud. If they ask for an inquiry, I will consider whether it ought to be granted.

Mr. Ferrall. The assignees do wish for an inquiry.

Mr. Anderdon. The petition has been a long time depending, and the assignees have had an opportunity of inquiring into the facts.

THE CHIEF JUDGE.—I forbear to enter into the merits of the case, nor do I express any opinion against the

(a) 2 Desc. 563.

(b) 1 Mont. Desc. & D. 116.

claim of the petitioner by the course I am about to pursue. But the interval was so short between the time of the deposit and the issuing of the fiat, and the affidavit of the petitioner gives so meagre an account of the transaction, that I think it is right there should be an inquiry, as the assignees request one. The inquiry should be, therefore, whether any, and what part of the sum of 800*l.* has become due from the bankrupt to the Western Banking Company, and when and under what circumstances the deposit of the deeds, and the agreement, were made; the petition in the mean time to stand over, reserving all costs, with liberty for the assignees, if they think proper, to waive the inquiry.

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CLOUTER.

Ex parte WILLIAM COLE COLE, GEORGE CHAPLIN HOLROYD, and JOHN COLE COLE.—In the matter of AYSHFORD WISE, NICHOLAS BAKER, and WILLIAM SEARLE BARTLETT.

THE bankrupts were bankers at Newton Abbot, in Devonshire, trading under the name of "The Newton Bank," and the petitioners, who were also bankers, carried on business at Exeter, under the name of "The Devon County Bank." On the 14th of July 1841, the petitioners sent to the bankrupts, among other

*Lincoln's Inn,
Feb. 6, 8, 22.*

Customers draw
cheques on their
bankers with
whom their ac-
counts are al-
ready over-
drawn, and pay
away the
cheques, which
come to the
hands of other

bankers. The second bankers remit to the first the cheques in a printed circular, desiring the amount of them to be paid to the London correspondents of the second bankers. Notwithstanding this circular, the custom between the bankers is to pay one another's cheques so far as circumstances permit, by remittances of notes of the bankers sending the cheques directly to those bankers, the understanding being however that the cheques should be paid on the day on which they are received, or the day following, either by such remittances, or by remittances according to the directions of the circular. The first bankers give the second credit in their books for the amount of the cheques, but become bankrupt three days after receiving them, and without having made any payment or remittance in respect of them, knowing at the time of receiving the cheques that bankruptcy was inevitable. The assignees obtain payment from the customers of the full amount of the cheques. *Held*, that the second bankers were entitled to payment in full of the same amount out of the bankrupts' estate.

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papers, three cheques drawn upon the bankrupts by three of their customers named *Lane*, *Pearce*, and *Rendall*, enclosed in a printed letter to the following effect, being the usual form used by the petitioners in such cases :

“ We enclose sundries, value 295*l.* 7*s.*, for our credit with Messrs. *Currie*, bankers, London.”

The amount for which the cheques were respectively drawn were 200*l.*, 3*l.* 19*s.*, and 13*l.* 12*s.* ; and it appeared that the accounts of all the three customers were at the time overdrawn, but that with regard to Mr. *Lane*, whose account was overdrawn to the amount of 600*l.*, the bankrupts had in their hands a security upon property of his of greater value than that sum, together with the amount of the 200*l.* cheque. The cheques had been paid into the petitioners' bank by customers of their's, who had received them from Mr. *Lane*, Mr. *Pearce*, and Mr. *Rendall*. No answer or acknowledgment was sent by the bankrupts on their receiving the cheques, but the amounts were entered to the debit of Mr. *Lane*, Mr. *Pearse*, and Mr. *Rendall* respectively, and to the credit of the petitioners ; the cheques themselves being cancelled, that is, being marked in the same manner, on the face of them, as was usual with respect to cheques which had been paid ; but no remittance was made to Messrs. *Currie*, or to the petitioners, nor in fact did any money pass on the occasion. The bankrupts stopped payment on the 17th of July, their bank having never opened after the evening of the 16th. The fiat issued on the 20th. After the bankruptcy, the assignees called on Mr. *Lane*, Mr. *Pearce*, and Mr. *Rendall* to pay the sums in which they were respectively debited in their overdrawn accounts, including the amount of the cheques in question, and received from them the three sums accordingly

in full. The petitioners now sought (with other matters as to which they at the bar waived their claims to relief) to be paid in full the amount of the three cheques, on the ground that they were remitted for a special purpose, which had not been fulfilled.

In opposition to the petition, affidavits were filed by the assignees, the object of which was to show that dealings of the same kind had been constantly taking place between the bankrupts and the petitioners, but that, although the same printed form of letter always accompanied remittances, yet that it was hardly ever complied with; the bankrupts, when they had notes of the petitioners or other Exeter paper, always making the required payment directly to the petitioners in such paper instead of sending the amount to London, as directed by the circular letter; and that occasionally, if the Exeter paper in hand were not sufficient, the difference was sent in a bank of England note; and that very frequently, and indeed on most occasions, the remittances to the petitioners did not amount to exactly the same sum as that of which payment was required, but exceeded or fell short of it by some small sum as suited the convenience of the parties, so that there was always an account current between them in respect of these small balances. This mode of dealing, it was further alleged, was never objected to by the petitioners, but was the usual mode of transacting business between country bankers, who could not be expected to pay their cheques by remittances to London, except when that mode of payment happened to suit their own convenience, a per centage being payable by them on such remittances.

The evidence adduced in support of the petition went to show, among other things, that when the cheques

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Ex parte
Cole
and others.

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COLE
and others.

were received, and the entries respecting them were made in the bankrupts' books, the bankrupts knew of their approaching failure. There was, however, no corresponding allegation in the petition.

Mr. *Swanston*, and Mr. *Follett*, in support of the petition. The cheques were remitted to the bankrupts for a specific purpose, and subject to a particular contract, by performing which they could alone acquire any property in them. The alleged cancellation can make no difference, nor can the mode, in which the bankrupts chose to treat the transactions in their own books, prejudice the rights of others. Besides, it is stated in the affidavits in support of the petition, that the bankrupts, at the time when they received the cheques, knew of their own insolvency and impending bankruptcy; and this allegation is nowhere met in the affidavits on the other side. The receipt of the cheques under such circumstances, upon an understanding, with which the bankrupts knew themselves to be unable to comply, must be considered by a Court of Equity as a fraud, through which it is impossible that the assignees could acquire any title.

Mr. *Anderdon*, and Mr. *Bacon*, for the assignees. All the petitioners are intitled to, is, to prove for the amount of the cheques. By their own acts, and the course of dealing between the two firms, the drawers of the cheques were completely exonerated, and there was, so far as they were concerned, substantially a payment of the cheques; the petitioners taking in lieu of them a credit upon the bankrupts. They have, however, no lien, nor have they any claim to preference over the general body of creditors. Suppose the cheques, which they allege to have

been remitted for a special purpose, were delivered up to them, what could they do more than prove, or how would their condition be better than that of other cheque-holders? The evidence, however, shows that an immediate remittance was not what was contracted for; such a course would have entailed on the bankrupts the payment of commission to the London bankers, an expense which they could not be expected to incur. The understanding was, merely, that credit should be given, until opportunities occurred of remitting to the petitioners the amount in their own notes. As to the allegation remaining unanswered, with reference to the bankrupts' knowledge of their own insolvency, that fact is not put in issue by the petition. They cited *Gillard v. Wise (a)*.

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Mr. *Swanston* was heard in reply.

On the petitioners asking that the case might stand over, with liberty for them to amend the petition, by introducing a statement to the same effect as the passage in the affidavit in support of it, as to the bankrupts' knowledge of their insolvency, the petition stood over accordingly; and, the assignees having filed an affidavit controverting the allegation in question, the case came on again to be heard this day, when, after hearing arguments as to the additional evidence, His Honour gave judgment as follows:

Feb. 22.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Considering that the question of the insolvency of the bankrupts, at the time when they received the cheques, and of their own knowledge of their insolvency, and their knowledge or expectation of their impending bankruptcy, might be

(a) 5 B. & C. 134.

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material, and finding those facts (as the evidence originally stood) proved against the assignees but not alleged in the petition,—but, being however of opinion that those facts were not likely to remain undenied, if capable of a denial, on account of their not being put in issue by the petition,—I thought it upon the whole the safer course (although I never said it was necessary) to permit the petition to be amended, and to allow further evidences to be gone into upon this part of the case. The result, however, is, that my mind remains in the same state as it was in before the additional affidavits were produced, and that my opinion continues to be, that the firm were insolvent, knew of their insolvency, and believed bankruptcy to be inevitable.

All relief has been waived, except in respect of the three cheques drawn respectively on the bankrupts themselves by Mr. *Lane*, Mr. *Pearce*, and Mr. *Rendall*, three customers of their banking house. The drawers of the two smaller of these cheques, Mr. *Pearce*, and Mr. *Rendall*, were originally stated to have been, when they were drawn, and to have continued to the time of the bankruptcy, creditors of the bankrupts, whether the cheques were paid or unpaid; and had this been the fact, as no greater relief could I think in that case have been possibly given as to those two cheques, than to direct them to be delivered to the petitioners, with a view to the petitioners suing the drawers,—and, as it would, in my opinion, have been manifestly unjust to sue the drawers on them under such circumstances, the Court, I conceive, would not have made any Order as to them. It appears, however, that there was an error as to the state of the accounts.

Although the three cheques were payable to bearer on

demand, the petitioners having become the holders of them, it was the duty of the petitioners, as between them and the drawers respectively, to present the three cheques, or cause them to be presented for payment with reasonable diligence; and it was, if not the duty, the right of *Wise & Co.*, the bankrupts, as between them and the drawers, to pay the cheques as soon as presented. They were sent by the petitioners to *Wise & Co.* on the 14th of July, and reached their hands the 15th, (I suppose in the morning). Throughout the 15th and 16th they continued to keep their banking house open, and appeared to do business as usual, but they never opened the shop afterwards. It is now ascertained, that the respective accounts of the three drawers of the cheques with *Wise & Co.* were overdrawn accounts. From Mr. *Lane* they had a security which has proved fully sufficient; and there can be little or no doubt as to his cheque, at least, that had it been presented by a stranger over the counter on the 15th, it would have been paid in the usual way. It is much the largest of the three. All are treated in their books as paid. The three cheques stand accordingly there to the debit of the three drawers respectively, and it is probable, or very possible, that the entries were made in the books before the afternoon of the 16th. But of course no money passed.

The transactions were merely transactions on paper, and respectively not communicated before the bankruptcy either to the petitioners, or to Mr. *Lane*, Mr. *Pearce*, or Mr. *Rendal*, so far as I am aware. *Wise & Co.*, as between the drawers and themselves, were entitled, and perhaps bound, to pay the cheques, or to treat and deal with them as paid by *Wise & Co.*; though, by so paying or treating and dealing with them, *Wise &*

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Co. made themselves to that amount creditors of the three drawers, already and otherwise their debtors respectively. Since the bankruptcy, the three drawers have treated the cheques as paid by *Wise & Co.* before the bankruptcy; and the drawers, being consequently their debtors for the amount at the time of the bankruptcy, have accordingly paid the assignees the three sums. The drawers have therefore no interest in the present contest. Whether the assignees or the petitioners succeed, is to each of the drawers indifferent; there can be no claim against either of them; the question being between the assignees and the petitioners, which of these latter are entitled to the sums thus received from the drawers.

I think it established by the evidence, that, as between the banking firm of the petitioners and *Wise & Co.*, according to their course of dealing, the cheques were received by *Wise & Co.* for the special and sole purpose that the money for which they were drawn should, on the 15th, the day when the cheques reached their hands, or on the following day, be transmitted in some sufficient shape by them either to the petitioners, or to the London bankers of the petitioners; and that *Wise & Co.* acquired possession of the cheques, and dealt with them as they did, knowing that they had no other right or interest in the cheques, and knowing that it would be a wrongful act to deal with the cheques in any other manner.

Having this knowledge, and with this duty incumbent on them, they profess to pay the cheques themselves by going through the form that I have mentioned, and so to acquire the apparent position of creditors,—creditors with security of Mr. *Lane*, general creditors of two other solvent persons, and general debtors without security for the amount,—and this with the intention, as I must take

it, of never paying the petitioners, or performing the trust upon which they had transmitted the paper to the bankrupts,—I say with that intention, because, notwithstanding the affidavits against this conclusion, it is on the whole proved to my satisfaction, that on the 15th *Wise & Co.* were to their knowledge insolvent, and knew bankruptcy to be substantially inevitable, and in truth, as I have said, their house was never opened after the 16th, the day following which seems to be the date of the act of bankruptcy.

It may be asked, what else, under such circumstances, they ought to have done? The answer is, that they should either have remitted the money on the 15th or 16th to the petitioners, or their London bankers, *Currie & Co.*, or have returned the cheques to the petitioners. I think that the course taken was, in the view of a Court of Equity, at least, if not of strict law, also fraudulent; an expression which I do not mean to use offensively.

The drawers' interests not being concerned, it seems to me, that, in whichever of the two only views capable of being taken this matter is regarded, the petitioners may obtain relief. If the cheques are to be considered as not paid before the bankruptcy, they have been paid since to the assignees; and, as in that view the property of the cheques remained in the petitioners, the money was received by the assignees for the petitioners' use. But, if the cheques are to be considered as having been paid before the bankruptcy, they were so in this way, and in this sense only,—as between the drawers and *Wise & Co.*,—that the drawers became the debtors of *Wise & Co.* for the amount. Those debts were specific *choses in action*, separable and distinguishable from their general assets, and, under the circumstances and for the

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and others.

reason to which I have referred, were acquired by them in my judgment as trustees for the petitioners,—were acquired by the bankrupts, subject to an equity in the petitioners' favour, not affected by the bankruptcy; and the money in discharge of them received by the assignees was had therefore for the use of the petitioners, who are accordingly in my opinion entitled to an Order for the three sums, and the costs of the petition, so far as not increased by seeking relief as to the notes, out of the estate. Though I dismiss the rest of the petition, I do not think justice requires the dismissal to be with costs. The assignees will take their costs of the whole petition out of the estate.

*Lincoln's Inn,  
Feb. 20 and  
March 8,  
and  
Westminster,  
coram Lord C.  
Nov. 6, 7, & 13.*

Ex parte WILLIAM GEMMELL and others.—In the matter of GARDNER BOGGS, WILLIAM TAYLOR, and WILLIAM SHAND the younger.

A. & Co., and B. & Co. engage in an adventure to India and China upon the following terms: that 10,000*l.* was to be invested in India bills, the proceeds of which were to be remitted to China, A. & Co. giving instructions as to one half, and B. & Co. as to the other half; and the outlay of money to either party to be saved by A. & Co. negotiating their drafts upon B. & Co., and renewing them till the funds came home; the 10,000*l.* was to be advanced by the parties in equal shares, but B. & Co.'s moiety was to be provided for by a bill drawn on them by A. & Co., payable at six months, and A. & Co.'s moiety by another bill drawn by them on B. & Co. payable at four months, which were to be discounted by A. & Co. Bills and goods are accordingly remitted from India to China, where the same are realized by the agents of A. & Co., and the proceeds invested by them in the purchase of other goods, one portion of which is consigned to A. & Co., and the other to B. & Co. in England. B. & Co. become bankrupt before their portion of the return proceeds arrive, and A. & Co. are obliged to pay the bill drawn by them for B. & Co.'s moiety of the 10,000*l.* Held, that this was not such a joint adventure, as to give A. & Co. a lien on B. & Co.'s portion of the return proceeds, for the amount of the bill.

THIS was the petition of creditors claiming a lien on the proceeds of certain goods and bills of exchange remitted to the bankrupts from China.

As the facts stated in the petition, and appearing in evidence on the hearing before the Chief Judge in Bankruptcy, were afterwards embodied in a special case on an appeal to the Lord Chancellor, it is thought better at

once to state the special case, on which both the judgments of the Chief Judge and the Lord Chancellor were respectively founded.

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 and others.

SPECIAL CASE.

In and prior to the month of January 1841, and from thenceforth to the time of the bankruptcy hereinafter mentioned, *William Gemmell* and *William Lyon M'Phum*, and *Thomas Gemmell*, deceased, up to the time of his decease in the month of January 1842, and *William Gemmell* and *William Lyon M'Phum* thereafter, carried on, as they still carry on, in copartnership together, the business of merchants at Glasgow in Scotland, under the firm of *Gemmell, Brothers & Co.*; and the said *William Gemmell* and *Thomas Gemmell*, up to the time of the decease of the said *Thomas Gemmell* as aforesaid, and *William Gemmell* and *Henry Robert Harker*, since such decease, have carried on business in copartnership together as merchants at Canton in China, under the firm of *W. & T. Gemmell & Co.*, which firms were and are the regular agents and correspondents in China of the said house of *Gemmell, Brothers & Co.* of Glasgow aforesaid; and the said last-named firm of *Gemmell, Brothers & Co.* were, during the period aforesaid, and have continued to the present time to be, also the regular agents and correspondents in Scotland of the said Canton house.

In and prior to the month of January 1841, and from thenceforth to the time of their bankruptcy, *Gardner Boggs*, *William Taylor*, and *William Shand* the younger, carried on business in copartnership together as merchants at Great Winchester Street, in the city of London, under the firm of *Boggs, Taylor & Co.*; and the said *William*

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*Shand* also at the same time carried on business as a merchant in copartnership with *William Bruce*, *William Patrick*, *Joseph Webbe Cragge*, *William Urquhart*, and *Hugh Morton Shand*, at Calcutta in the East Indies, under the firm of *Bruce, Shand & Co.*; and the said last-mentioned firm were, during the whole of the period aforesaid, the agents and correspondents in Calcutta of the said London house of *Boggs, Taylor & Co.*

*Robert Frederick Gower*, *Abel Lewis Gower*, *Gregory Seale Walters*, and *Edwin Gower*, have during the last two years and upwards carried on, and still continue to carry on, the business of merchants and commercial agents in copartnership together, under the firm of *A. A. Gower, Nephews & Co.*

In the month of January 1841 the said firm of *Gemmell, Brothers & Co.* wrote and sent to the said firm of *Boggs, Taylor & Co.* a letter dated the 19th of January, which was as follows:—

“ Dear Sirs.—With reference to conversations the writer had with you when in London respecting transactions to China, the late accounts from thence induce us to propose to you the following operation, and shall be glad to find it meet with your approval :

“ 1st. That 10,000*l.* be invested in bills on the Bengal government ; the firsts of the sum to be transmitted by you to your friends at Calcutta by next overland mail.

“ 2d. Proceeds of the bills to be remitted to our friends in China, you giving instructions, as regards remittances to China and from China to this country, for one half, and we for the other. The same to come direct to you, and to us, respectively.

“ 3d. Outlay of money to either party to be saved by our negotiating our drafts upon you at convenient dates,



and renewing them till the funds come home. We think this a better mode of placing such a transaction than joint accounts, but should you differ with us, we will be happy to have your views; it serves the same purpose as regards saving outlay of money, puts the same amount of commission respectively into the foreign houses, and enables each party to give such instructions as to investment as may appear to them best. We send copy of this to your Mr. *Boggs* at Liverpool. (Signed) *Gemmell, Brothers & Co.*"

In reply to the proposal so made in the said letter, *Boggs, Taylor & Co.* sent to the said *Gemmell, Brothers & Co.* the following letter:—

London, January 26th 1841.

"Dear Sirs.—We have to acknowledge your favour of the 19th instant, and only awaited the arrival of our Mr. *Shand* to answer the same. He, with our Mr. *Boggs*, approves of a China transaction, but with some deviations to your proposal. Thus, instead of sending the 10,000*l.* to Calcutta, to divide the amount and send 5000*l.* to China, viâ Madras,—do. China, viâ Bombay. This division we think would be to our mutual interest, rather than sending the amount to Calcutta, where large amounts have been sent for the same purposes. To your other arrangements we perfectly agree, and trust this will be only a beginning of a business conducted to the mutual benefit of both parties. Remaining yours, &c. *Boggs, Taylor & Co.*"

Immediately on receipt of the said last-mentioned letter, the said *Gemmell, Brothers & Co.* wrote and sent to the said *Boggs, Taylor & Co.* a letter which was dated the 28th January 1841, and was as follows:—

"Dear Sirs.—We have received your favour of the

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26th instant, and now beg to inform you that it is our intention to remit to you on Saturday, 30th instant, proceeds of our drafts on you for 5000*l.* and 5000*l.* We entirely approve of your suggestion as to destination of the intended remittances, and propose that one-half should be sent to Bombay, yours being sent there also, or to Madras, as you may prefer. We will feel obliged by your acquainting us with the name of your house at Bombay. We will write to them on the 1st proximo, sending our letter through you for transmission per overland mail. We are, &c. *Gemmell, Brothers & Co.*"

The said *Gemmell, Brothers & Co.* accordingly, on the 30th January 1841, drew upon the said *Boggs, Taylor & Co.* two several bills of exchange for the sum of 5000*l.* each; and at the same time, and before sending the said bills for acceptance to London, procured the same to be discounted in Glasgow on their own credit, and remitted the proceeds to the said *Boggs, Taylor & Co.* in London, accompanied by a letter, which was as follows :—

Glasgow, 30th January 1841.

"Dear Sirs.—We wrote you on the 28th instant, and now enclose Glasgow Union Bank credit in your favour with *Jones, Lloyd & Co.* for 4850*l.* 6*s.* being proceeds, per memorandum at foot, of a bill we have to-day drawn upon you at six months date, for 5000*l.*, to which please do due honour. We also enclose Western Bank of Scotland draft at thirty days date for 5000*l.* on *Jones, Lloyd & Co.*, and beg to advise our having to-day drawn upon you at four months' date for a similar amount, which we request you will accept on presentation. It is understood, that these remittances are made you for the purchase of two bills drawn by the Company of Directors on

the East India Company's treasury, Calcutta, each to the value of 5000*l.*, say 5000*l.*, one being on your, and the other on our account, and both to be transmitted to your friends at Bombay or Madras for realization and remittance to Messrs. *W. & T. Gemmell & Co.*, China, in accordance with instructions given by you and ourselves for our respective amounts. We agree to save cash outlay, by renewing the bills drawn to-day till bills or bills of lading are received from China as remittances for each amount, and to keep which distinct you will please consider the bill drawn at six months as exclusively intended to provide for your moiety of the transaction, and the one at four months for ours. We will forward you a copy of our letter of instructions to your Bombay friends, and will feel obliged by your doing the same to us. Please hand us note of the discount on the bill at thirty' days date, when the same shall be remitted to you.

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|                                                  | £    | s. | d. | £      |
|--------------------------------------------------|------|----|----|--------|
| " Bill due August 2d 1841 . . . . .              | 5000 |    |    |        |
| Discount, 181 days at $5\frac{1}{2}\%$ . . . . . | 136  | 7  | 6  |        |
| Order on <i>Jones &amp; Co.</i> . . . .          | 4850 | 6  | 0  |        |
| Premium 20s. at $5\%$ . . . . .                  | 13   | 6  | 6  | —5000" |

On the 30th January 1841 the said Messrs. *Boggs, Taylor & Co.* wrote and sent the following letter to the said *Gemmell, Brothers & Co.* :—

" Dear Sirs.—We acknowledge your favour of the 28th inst., and are pleased by your promptness in remittances. We note your preference to Bombay. Our Mr. *Boggs* will be in town Monday or Tuesday, when we will refer to him as to our 5000*l.* going to Madras, but should rather prefer 2500*l.* on each amount to the two presidencies named, writing the parties to keep the

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accounts distinct. The names of our Bombay house, Messrs. *B. & A. Homarjee*; Do. Madras, Messrs. *Parry & Co.*—*Boggs, Taylor & Co.*"

In reply thereto, the said Messrs. *Gemmell, Brothers & Co.*, wrote and sent the following letter to the said Messrs. *Boggs, Taylor & Co.*

"Glasgow, 1st February 1841.

"Dear Sirs.—We have your favour of the 30th ult., now beg to enclose letter to your Bombay friends on to China, through your friends at Madras or Calcutta, should they think it more for our interest to do so, than remit direct from Bombay. We thought it were hardly worth while dividing the 5000*l.*, after filling up the blank left in the first page of our letter for the amount of the bills, and noting at foot the particulars. You will please to forward the same with the enclosed, *viâ* Marseilles; and we request you will send us the seconds and thirds, for us to forward along with the duplicate of our letter to Messrs. *B. & A. Homarjee*. We are, &c.

"*Gemmell, Brothers & Co.*"

On the 1st February 1841, the said *Boggs, Taylor & Co.*, wrote to the said Messrs. *Gemmell, Brothers & Co.* a letter, which was as follows.

"London, 1st February 1841.

"Dear Sirs.—We have to acknowledge your favour of the 30th ult., enclosing an order on *Jones, Lloyd & Co.* for 4850*l.* 6*s.*, proceeds of a bill drawn on us at six months, to be placed to our account and to be invested in East India Company's bills on the Bengal Government. We are also in the receipt of Western Bank of Scotland draft, at 30 days' date, on *Jones, Lloyd & Co.* for 5000*l.*; and note your advice of bill at four months' date to same amount to be placed to your account, all of

which will be duly accepted on presentation. This sum also to be invested in East India Company's bills on Bengal Government on your account, the whole amount to be forwarded to Madras and Bombay for transmission to your firm in China; we giving instructions for investment of our moiety, you doing the same for yours. Expecting to hear from you with your Bombay instructions, we are, &c.

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"*Boggs, Taylor & Co.*"

The said *Boggs, Taylor & Co.*, having by means aforesaid, received the proceeds, remitted part thereof, to the value of 7500*l.*, to the said *B. & A. Hormajee* of Bombay, in the East Indies, who were the correspondents and agents of the said firm of *Boggs, Taylor & Co.* at Bombay, in the form of eight bills on the Bengal Government, enclosed in or accompanied by the following letter.

"Messrs. *B. & A. Hormajee*, Bombay.

"Great Winchester Street, London, 4th Feb. 1841.

"Dear Sirs.—We have the pleasure of forwarding to your address bills on the Bengal Government, amount 7500*l.* as follows:—

|         |           |       |           |           |    |   |
|---------|-----------|-------|-----------|-----------|----|---|
| No. 994 | . . . . . | £1000 | . . . . . | Rs. 10434 | 12 | 6 |
| 995     | . . . . . | 1000  | . . . . . | 10434     | 12 | 6 |
| 996     | . . . . . | 1000  | . . . . . | 10434     | 12 | 6 |
| 997     | . . . . . | 1000  | . . . . . | 10434     | 12 | 6 |
| 998     | . . . . . | 1000  | . . . . . | 10434     | 12 | 6 |
| 999     | . . . . . | 1000  | . . . . . | 10434     | 12 | 6 |
| 1000    | . . . . . | 1000  | . . . . . | 10434     | 12 | 6 |
| 1001    | . . . . . | 500   | . . . . . | 5217      | 6  | 3 |

Which we request you will apply as follows. By the enclosed letter from our friends Messrs. *Gemmell, Brothers & Co.*, you will see those gentlemen are interested

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in this transaction to the amount of 5000*l.*; this amount you will apply as they direct; on our account, you will be pleased to invest the remaining 2500*l.*, with an additional sum of 2500*l.*, which you will please reimburse yourselves by drawing upon us. You will transmit the proceeds to China to the address of Messrs. *Wm. & T. Gemmell & Co.*, either in respondentia or purchases of cotton, on our account, whichever you think will be most to our advantage. We leave this entirely to your good judgment, as results of former transactions have proved satisfactory. We shall dispatch the "*William Shand*" to your address, sailing beginning of March, with consignments of ours and others. Remaining yours respectfully,

"*Boggs, Taylor & Co.*"

Messrs. *Gemmell, Brothers & Co.* did not know that *Boggs, Taylor & Co.* had not, agreeably to the terms of the aforesaid correspondence, remitted to India the whole of the proceeds of the two bills, until after the bankruptcy of *Boggs, Taylor & Co.*

Messrs. *Gemmell, Brothers & Co.* at the same time wrote and sent a letter of instruction to the said Messrs. *B. & A. Hormajee*, relative to the 5000*l.* so remitted to them on account of Messrs. *Gemmell, Brothers & Co.*, which letter was sent to *Boggs, Taylor & Co.* to be forwarded, and was by them forwarded to Messrs. *Hormajee*, together with the last mentioned letter and bills, and which letter was as follows:—

"Messrs. *B. & A. Hormajee*, Bombay, per Overland Mail.

"Glasgow, 1st February 1841.

"Gentlemen.—We have been made acquainted with your firm by our friends Messrs. *Boggs, Taylor & Co.*,

and on their recommendation entrust to your management the enclosed remittance, consisting of the first of bills drawn by the Court of Directors on the Bengal Treasury for Company's rupees 51273. 14. 6, as particularized at foot. The object of this transaction is to place funds in the hands of our friends Messrs. *W. & T. Gemmell & Co.*, China. We feel disposed to leave the management of this transaction, so far as the Indian part of it is concerned, very much to your own good judgment, it not being in our power to frame instructions to meet all contingencies, particularly in the present uncertain state of our relations with China; there are, however, a few points with which it will be well to make you acquainted, as developing our views. 1st. Dispatch in having the funds in hands of *W. & T. Gemmell & Co.* at as early a date as possible, for transmission to us; to promote which you will of course, immediately on receipt, send the enclosed to Calcutta for acceptance, discounting the same, should an opportunity offer of immediately sending the proceeds into China.

"2nd. We are not disposed to run any risks of markets, by shipments of cotton or opium on our own account.

"3rd. The most satisfactory mode of sending on the funds would be advancing on consignments of cotton or opium, to address of *W. & T. Gemmell & Co.*; the latter, only, if its import into China is legalized.

"4th. In the event of such consignments not being procurable, we should wish the remittance to China to be in bills, if possible, secured by shipping documents.

"5th. Should you find it would be secure for our interest, that the fund should be remitted through Madras or Calcutta, you will please send the bills, or order the

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proceeds to be paid to Messrs. *Parry & Co.* Madras, or Messrs. *Bruce, Shand & Co.*, Calcutta, handing them this letter, or a copy of it, for their guidance.

"6th. Being unaware what ports may be opened in China, we cannot give you any explicit instructions as to the address of our firm, but we presume the better way will be for you to address your dispatches to *W. & T. Gemmell & Co.* (late of Canton) China; of this, however, you will be better judges than we can. One inducement for us to place this operation in your hands, rather than in those of the parties who have previously done business for us in Bombay, is, that we expect to induce you to engage in promoting consignments of goods and vessels to *W. & T. Gemmell & Co.* One of the principles upon which we conduct our business is reciprocity, and we will be quite ready to make it an object to you. With tender of our best services in the disposal of any shipments, cotton, &c. you may make to the Clyde, against which we will be prepared to accept your drafts at the usual date, for three-fourths the amount, we are, Gentlemen, yours, very respectfully,

"*Gemmell, Brothers & Co.*

"We send the present through Messrs *Boggs, Taylor & Co.*, for them to enclose the bill.

"*Gemmell, Brothers & Co.*"

On the 6th February 1841, *Boggs, Taylor & Co.* wrote and sent to *Gemmell, Brothers & Co.* a letter, of which the following is a copy.

"London, 6th February 1841.

"Dear Sirs.—By Overland Mail, 4th inst. we forward first of enclosed bills, amount 5000*l.* We now enclose second and third under separate covers to your address,



trusting the transaction may turn out satisfactory. We remain, &c.

“ *Boggs, Taylor & Co.*

“ P.S. Discount on 5000*l.*, twenty-nine days, 19*l.* 17*s.* 3*d.* We have written Messrs. *B. & A. Hormajee* to forward our 5000*l.*, as they may see best to our advantage, either in purchase of cotton or respondentia, to Messrs. *W. & T. Gemmell & Co. China.*”

The eight East India Company's bills, to the value in the whole of 7500*l.*, which were so remitted by *Boggs, Taylor & Co.* to Bombay, enclosed in the said letter of the 1st February 1841, duly came to the hands of Messrs. *B. & A. Hormajee*, at Bombay; and upon receiving the same, the said Messrs. *Hormajee*, agreeably to the aforesaid instructions of *Gemmell, Brothers & Co.* on that behalf, there disposed of a portion of the said bills, to the value of 5000*l.*, being that portion of the said bills which had been appropriated to Messrs. *Gemmell, Brothers & Co.*; and such proceeds were thereupon duly remitted by Messrs. *Hormajee* to said *W. & T. Gemmell & Co.*, at Canton, by whom the same were afterwards invested in the purchase of goods or silks, which were sent home to this country, consigned to Messrs. *Gemmell, Brothers & Co.*, of Glasgow, who eventually received the said goods or bills, or the value thereof, as their returns accordingly; and no question has been raised, or now arises, with respect to such returns.

Messrs *Boggs, Taylor & Co.* did not remit to India the full sum of 5000*l.*, so raised or advanced for their use and on their account as before mentioned, but, without the knowledge of *Gemmell, Brothers & Co.*, retained 2500*l.*, part thereof, in their own hands, and remitted the remaining moiety thereof, being the residue of the

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aforesaid East India Company's bills, after answering the before-mentioned appropriation in favour of *Gemmell, Brothers & Co.*, to Messrs. *B. & A. Hormajee*, their correspondents and agents at Bombay; and Messrs. *Hormajee*, in pursuance of the instructions contained in the foregoing letter of *Boggs, Taylor & Co.* of the 4th February 1841, advanced on their account a further sum of 2500*l.*, for which they drew bills on *Boggs, Taylor & Co.*; thus making up, with the value of the said 2500*l.* of East India bills, the full sum of 5000*l.*, which was afterwards invested by *B. & A. Hormajee*, in pursuance of the instructions of *Boggs, Taylor & Co.*, partly in the purchase of bills of exchange, and partly in the purchase of opium; both of which, in conformity with the said correspondence, were consigned to *W. & T. Gemmell & Co.* at Canton, to be realized, and the proceeds to be invested in other bills and merchandize, and the returns sent home to this country, as hereinafter more particularly mentioned.

On the 4th March 1841, *Boggs, Taylor & Co.* wrote and sent to Messrs. *W. & T. Gemmell & Co.* of Canton, the following letter :

“ Per Overland, viâ Marseilles.

“ Messrs. *W. & T. Gemmell & Co.* Canton.

“ London, Great Winchester Street, March 4th 1841.

“ Gentlemen.—We have the pleasure of enclosing a letter of introduction from our friends Messrs. *Gemmell, Brothers & Co.* of Glasgow, and having had several interviews with Messrs. *W. & T. Gemmell*, the result is, we have been induced to make consignments to your house at Canton; our present shipment from this country is shirtings per *Bewlah*, and we have instructed Messrs. *B. & A. Hormajee* to forward goods or bills to the amount

of 5000*l.*, conjointly with 5000*l.* sent by Messrs. *Gemmell, Brothers & Co.* of Glasgow. We have likewise sent shipments per *William Shand*, proceeds of which if desirable are to be forwarded per *William Shand* to your address, as we are completely at a loss what instruction to give in these uncertain times. We must leave this first commencement of business in your hands, mentioning, we wish to avoid silk unless best Statlee could be laid down here at 15*s.* or 16*s.* Teas entirely depend on the exports from your quarter; if they amount to our consumption here, we should not like them, unless at rates from 4*d.* to 6*d.* below our present prices. We enclose you prices, being yours faithfully,

“ *Boggs, Taylor & Co.*”

On the 25th May 1841, Messrs. *Boggs, Taylor & Co.* sent to Messrs *Gemmell, Brothers & Co.* at Glasgow, a bill drawn by the said Messrs. *Bruce, Shand & Co.* on them *Boggs, Taylor & Co.* for the sum of 1625*l.*, together with the following letter:

“ Messrs. *Gemmell, Brothers & Co.* Glasgow.

“ London, 25th May 1841.

“Gentlemen.—We have had the pleasure of seeing your Mr. *Gemmell* at our office here, and by his desire we enclose you an East India bill on us for 1625*l.*; no doubt Mr. *Gemmell* will write you on the subject, and we shall now fully depend on you for funds to meet your bill, due Wednesday June 2nd; and may we request your attention to have the cash at our bankers on the 1st? Report says, money will be plentiful in ten days. Sugar and teas rather improving. We are, &c.,

“ *Boggs, Taylor & Co.*”

In reply to the last mentioned letter, *Boggs, Taylor & Co.* received from Messrs. *Gemmell, Brothers & Co.* a letter of which the following is a copy:

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“Messrs. *Boggs, Taylor & Co.*, London.

“Glasgow, 29th May 1841.

“Dear Sirs.—We last addressed you on the 20th, and have since received your favour of the 25th instant, enclosing bill for 1625*l.* Observing that your acceptance for 5000*l.* falls due on 2nd proximo, we now wait upon you with remittance for 5808*l.* 15*s.* 11*d.*, which you will please to apply to payment of it, and against which you will be pleased to accept our drafts on you for 1000*l.* and 2500*l.*, as per memorandum below. We are, dear Sirs, yours very truly,

“*Gemmell, Brothers & Co.*”

| 1841                                                 | £    | s. | d. | £    | s. | d. |
|------------------------------------------------------|------|----|----|------|----|----|
| Bill due 5th October .....                           | 2500 | 0  | 0  |      |    |    |
| 129 days at 5 <i>s.</i> .....                        | 44   | 3  | 6  | 2455 | 16 | 6  |
| 7th November.....                                    | 1625 | 0  | 0  |      |    |    |
| 162 days at 5½ % .....                               | 39   | 13 | 3  | 1585 | 6  | 9  |
| 2nd December .....                                   | 1000 | 0  | 0  |      |    |    |
| 187 days at 5½ % .....                               | 28   | 3  | 6  | 971  | 16 | 6  |
| 10 days allowed by bank on bill for 2500 <i>l.</i>   | 3    | 8  | 6  |      |    |    |
| Less stamp .....                                     | 0    | 15 | 0  | 2    | 13 | 6  |
|                                                      |      |    |    | 5015 | 13 | 3  |
| Bill on <i>Jones, Lloyd &amp; Co.</i> due 1st July.. | 2500 | 0  | 0  |      |    |    |
| Order on <i>Sanderson &amp; Co.</i> 1st June ....    | 2508 | 15 | 10 |      |    |    |
| Premium on ditto, 20 days at 5 % .. ..               | 6    | 17 | 5  |      |    |    |
|                                                      |      |    |    | 5015 | 13 | 3  |

“The enclosed bill for 2500*l.* we will thank you to return accepted.—*G. B. & Co.*”

*Boggs, Taylor & Co.*, on the 5th July 1841, wrote and sent the said *W. & T. Gemmell* of Canton, a letter of that date, which (so far as is material) was as follows :

“Dear Sirs.—We have accounts from our friends Messrs. *B. & A. Hormajee*, having forwarded 5000*l.* on our account in opium and bills. We trust the same have got safe to hand; but from the uncertain state of the affairs in China, we would request the funds should be

sent home in good bills, if the settlement of affairs should be protracted. This you would be better judges of than ourselves. Teas should and must be laid down here from 1s. 4d. to 1s. 10d. good congous. You will see, from all late sales, how difficult it is to raise the price; even at present 2s. 8d., with small stock in hand. We would not like to be kept out of funds longer than you can see your way of making remittances. Silk we do not like, unless exceedingly low; it is not usually a safe article."

Shortly afterwards, the bills remitted to Canton on account of *Boggs, Taylor & Co.* were realized by *W. & T. Gemmell & Co.*, and the proceeds thereof were by them invested in the purchase of 13 bales of raw silk, and by them shipped on board a vessel called the *Bewlah*; and the bill of lading thereof was filled up to order, and by indorsment was ordered to be delivered to *Boggs, Taylor & Co.*, as hereinafter more particularly mentioned.

In reference to the said purchase and shipment of silks, *W. & T. Gemmell & Co.* on the 25th August 1841, wrote and sent to *Boggs, Taylor & Co.* a letter, which was as follows :

" Macao, 24th August 1841.

" Your esteemed letters of 4th May and 5th June have had our careful attention, and we beg to thank you for your remarks on produce, and for price current you sent us. We notice with pleasure that you have written to your Bombay and Calcutta correspondents regarding transactions to this, and we assure you that our best personal attentions and superintendence will be given to working favourable results to any consignments they may place in our hands, on account of two bills of exchange received from Messrs. *B. & A. Hormajee* in

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part of your 5000*l.*, placed at Bombay, say due 18th August  $\text{£}3846. 15.$ , and due 24th  $\text{£}1340. 86.$

Together . . . . . 5187. 01

Loss 1 % for realizing . . . . . 51. 87

---

  $\text{£}5135. 14$

We now hand you invoice for W.

G. T.  $\frac{1}{10}$  bales silk, value . . .  $\text{£}5050. 50$

Balance in your favour  $84. 64$

"We are expecting the *Bewlah* in the roads every moment, and still have hopes of enclosing bills of lading for these thirteen bales; the bill of lading we at present have signed by Captain *James*, includes several parcels of silk besides W. G. T. 1 & 13, the *Atalanta* is said to leave for Bombay, at 3 per maund; if the *Bewlah* should not arrive in time, we trust you will not have any inconvenience in effecting insurance without them; she was to leave Whampoa for this 20 or 21st, being quite full, and she will leave this for London about 28th instant—freight of silk 9*l.* 9*s.* per 50 feet. We have sent you this silk, as returns for the bills, under the strong impression that we could not better promote your interest, and on its realization you will no doubt find a more favourable result than bills on London at 6 and 4*s.* 8*d.* per dollar, the present exchange (less 1 % for bill remittances.) From the arrangements you have made with our Glasgow friends, we would suggest that the proceeds of this remittance might be applied to the liquidation of any bills that may be on circulation at the time between your good selves and *Gemmell, Brothers & Co.*"

In the months of February and June 1841, the said *Gardner Boggs*, who then also carried on business in the town of Liverpool in his own name alone, consigned to the said *W. & T. Gemmell & Co.* at Canton, certain shipments of goods amounting in all to the value of

1858*l.* 3*s.* 2*d.*, or thereabouts, by two ships called the *Bewlak* and the *Arethusa*. On the 28th June 1841, he wrote and sent to *Gemmell, Brothers & Co.* at Glasgow, aforesaid, a letter which was as follows :

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“ Dear Sirs.—As you proposed keeping us out of any cash advances on our shipments to your house in China, I now draw on you for 1500*l.* on the shipment per *Saghalier* last February, and *Arethusa*, which draft please return accepted payable in London. As I put it in the bill against the above, it will appear a transaction of mine, and not mixed up with the London house. Yours, &c. *Gardner Boggs.*”

“ Of course, *Boggs & Co.* will put you in funds for this draft, it being understood we mutually keep each other out of cash advances on our transactions with your house in China.—*Boggs, Taylor & Co.* per *G. Boggs.*”

Enclosed in the said letter of the 28th June 1841, was a bill of exchange dated the 28th June 1841, drawn by the said *G. Boggs* on the said *Gemmell, Brothers & Co.*, payable six months after date for 1500*l.*, and at the foot or corner of which were written the words “ *P. Saghalier.*” This bill was as follows :

“ No. 896. 1500*l.* Liverpool, 28th June 1841.

“ Six months after date pay to the order of myself, in London, Fifteen hundred pounds sterling, value received.

“ Messrs. *Gemmell, Brothers & Co.* *P. Saghalier.*

“ Glasgow. *Gardner Boggs.*

Written across “ At Messrs. *Jones, Lloyd & Co., Gemmell, Brothers & Co.*”

Indorsed:—“ *Gard. Boggs.*

“ Pro the Liverpool Union Bank.

“ *James Lister, Manager.*

“ Received for *Barclay, Bevan & Co.*

“ *J. G. Phillips.*”

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The last mentioned bill for 1500*l.* was immediately on the receipt thereof duly accepted by *Gemmell, Brothers & Co.*, who in the course of a few days thereafter returned their said acceptance to the said *G. Boggs*, enclosed in a letter, which (so far as is material) was as follows :—

“ *G. Boggs*, Esq.

Glasgow, 29th June 1841.

Dear Sir.—We last had this pleasure on the 9th, and have received your favour of the 28th instant, enclosing a bill for 1500*l.* drawn against goods per *Saghalier*, which we return accepted. We have not yet received invoice of those goods, and we will accordingly feel obliged by your sending us a copy of it at your convenience. We are, &c.

“ *Gemmell, Brothers & Co.*”

In another letter dated 28th June 1841, and sent to the said *Gemmell, Brothers & Co.*, after enclosing bills of lading for woollens and twist shipped per *Arethusa*, and consigned to the Canton house, *G. Boggs* expressed himself as follows ; —“ On this and the *Saghalier* I provided insurance.”

On the 3rd July 1841, the said *G. Boggs* in a letter to the said *Gemmell, Brothers & Co.*, says :—“ You have received a copy of invoice of the shipment per *Bewlah*, and in the course of a post or two shall send you that per *Arethusa*, being very busy to day with our overland despatches.—*G. Boggs*. The insertion of *Saghalier* was a mistake.”

No shipment of goods, consigned to the said Canton house, was ever in fact made by the said *G. Boggs*, by the ship called the *Saghalier* ; and in speaking in his letters, and particularly in his said letter of the 20th



June 1841, of a shipment by the *Saghalier*, the said *G. Boggs* referred to, and meant to designate, a shipment which he had made by said ship *Bewlah*, and he substituted the name of the *Saghalier* inadvertently and through mistake for the *Bewlah*; which mistake he stated and corrected, as well in the postscript to his said letter of the 3rd July 1841, as in another letter which he wrote and sent to the said *Gemmell, Brothers & Co.*, some time before his said letter of the 28th June 1841, and wherein he expressed himself as follows:—"It was by the *Bewlah*, and not by the *Saghalier*, that the shipment of goods was forwarded to your house in China, and in case of their having been mislaid, I forward you particulars again.—*G. Boggs.*"

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On the 27th October 1841, *G. Boggs* sent from Liverpool to *Gemmell, Brothers & Co.*, another bill of exchange for 1000*l.*, dated the 27th October 1841, drawn on *Gemmell, Brothers & Co.*, and payable four months after date, enclosed in a letter which was as follows:—

Dear Sirs.—I return you draft for 2400*l.* which I replaced with the 2000*l.*; the former was used as a loan through the Bank of England, and I could only lift it the other day. I now enclose you my draft at eleven months for 1000*l.*, which have the goodness to return in course, and the particulars shall be handed to you next week. I am still in advance on goods shipped to your house in Canton, and intend making a further shipment, as I presume from what you say, we may calculate on sharp returns from Mr. *Harker*.—Yours &c.,

"*G. Boggs.*"

In reply to this letter, *Gemmell, Brothers & Co.*,

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wrote and sent to the said *G. Boggs* a letter which was as follows :

" Glasgow, 28th October 1841.

" Dear Sir.—We last had this pleasure on the 11th ultimo, and have since received your favour of 27th instant, enclosing our bill to Messrs. *Boggs, Taylor & Co.* for 2400*l.*, and your draft upon us for 1000*l.*, the latter of which we now return duly accepted. We are glad to observe that you are making a further shipment to our friends in China, and will feel obliged by your sending us copy invoice when it is completed. We are,  
*Gemmell, Brothers & Co.*"

And together with this letter, Messrs. *Gemmell, Brothers & Co.*, sent to *G. Boggs* at Liverpool their acceptance as therein mentioned for 1000*l.*

The goods so shipped by *G. Boggs* on board the vessel called the *Bewlah*, which was a vessel which had been chartered by *Gemmell, Brothers & Co.*, both for her outward and homeward voyage, duly arrived at Canton, and were there sold by *W. & T. Gemmell & Co.*, and the proceeds of such sale were by them invested in the purchase of a quantity of tea, which, together with the said bales of silk, was shipped on board the said ship *Bewlah* for London, and consigned to *Boggs, Taylor & Co.*

With reference to the proceeds of the said shipment of goods to Canton by the *Bewlah*, and the investment and remittance of such proceeds in tea as aforesaid, *W. & T. Gemmell & Co.*, in their aforesaid letter of the 24th August 1841, wrote to said *Boggs, Taylor & Co.*, as follows:—" The 40 bales grey shirting, ex *Bewlah*, have been sold to 280 short price, which is now about

20 per cent. more than present value in Canton; such is the very bad state of business there. We think you will be interested in the teas per *Bewlah*, and that you had better insure to the extent of 5200*l*. We beg to refer you to local papers aforesaid, and to what our Glasgow friends will write you, as we are very much engaged for the *Atalanta*. Freight on teas, 9*l*. per 50 feet.

(Signed) *W. & T. Gemmell & Co.*

The bill of lading of the said teas was in the following form: "Shipped in good order and well conditioned, by *W. & T. Gemmell & Co.* of Canton, in and upon the good ship called the *Bewlah*, whereof is master for the present voyage *Daniel James*, and now riding at anchor in the Canton river, and bound for London, 167 chests, and 60 half chests Hyson tea, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of London, the act of God, the Queen's enemies, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature or kind excepted, under order. Freight for the said teas to be paid to the charterers at the rate of 9*l*. per ton of 50 cubic feet, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to 5 bills of lading, all of the tenor and date, the one of which 5 bills being accomplished, the other 4 to stand void. Dated in Canton, 18th August 1841, contents unknown. (Signed) *Daniel James*."

Five parts of the said bills of lading as therein mentioned were signed by *Daniel James*, the master of the said ship *Bewlah*, and were indorsed by the said *W. & T. Gemmell & Co.* as follows:—"Deliver to the order of Messrs. *Boggs, Taylor & Co.*—*W. & T. Gemmell & Co.*"

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*W. & T. G.  
& Co.*  
65—100 chests  
of Hyson.  
66—67 chests  
of Hyson.  
67—60 half  
chests Hyson.

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The bills of lading of the bales of silk so shipped and consigned by the *Bewlah* to *Boggs, Taylor & Co.*, was, *mutatis mutandis*, in the same form as the said bill of lading of the teas, except as to marks and numbers; and 5 parts thereof were in like manner signed by the said master, and indorsed by *W & T. Gemmell & Co.* to the said *Boggs, Taylor & Co.*

The said teas having been accordingly shipped on board the *Bewlah* by *W. & T. Gemmell & Co.*, under the circumstances above stated, together with the said 13 bales of silk, and consigned to the said *Boggs, Taylor & Co.*, of London, the *Bewlah* sailed from China some time in or about the month of September 1841, and proceeded on her voyage to London.

In order to provide funds for the payment of the bill of exchange, which was drawn by *Gemmell, Brothers & Co.* on *Boggs, Taylor & Co.* for 5000*l.*, payable six months after date, *Gemmell, Brothers & Co.*, on the 31st July 1841, drew two several bills of exchange on *Boggs, Taylor & Co.*, one of which was for 3000*l.*, payable at six months from the 9th July 1841, and the other for 2000*l.*, payable at six months from the said 31st July 1841, being the respective dates thereof, and sent the last-mentioned of the said bills to *Boggs, Taylor & Co.* for acceptance, who accepted the same on the receipt thereof; and at the same time *Gemmell, Brothers & Co.* wrote to and requested *Boggs, Taylor & Co.* to accept the former of the said bills on presentation, which *Boggs, Taylor & Co.* accordingly did.

On the said 31st July 1841, *Gemmell, Brothers & Co.*, having procured the said bills to be both discounted, remitted the proceeds, amounting to 4874*l.* 9*s.* 8*d.*, to *Boggs, Taylor & Co.*, together with a letter and state-

ment of account in writing, which were respectively as follows; (that is to say),

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"Glasgow, 31st July 1841.

"Dear Sirs.—We addressed you on the 28th instant, and have not since had the pleasure of hearing from you. In provision for your acceptance to us for 5000*l.* due 2nd prox., we now hand you Western Bank draft for 4874*l.* 9*s.* 8*d.*, being proceeds as per memorandum below of our drafts on you at six months, from 9th inst., for 3000*l.*, and 31st inst. for 2000*l.*; the latter of these bills we enclose, and will feel obliged by your returning it us accepted, and the former you will be pleased to accept on presentation. Should it happen, however, that you have already sent, or can on receipt of this send, us Calcutta bills in place, we will thank you to return the enclosed draft unaccepted, its place being supplied by bills from India.

"(Signed) *Gemmell, Brothers & Co.*"

|                                                                  | £     | s. | d. | £     | s. | d. |
|------------------------------------------------------------------|-------|----|----|-------|----|----|
| Bill due January 12th, 1842.....                                 | 3000  | 0  | 0  |       |    |    |
| Discount, 165 days, at 5½ o.° .....                              | 74    | 11 | 9  |       |    |    |
|                                                                  |       |    |    | 2925  | 8  | 3  |
| Bill due February 3rd, 1842 .....                                | 2000  | 0  | 0  |       |    |    |
| Discount, 187, at 5½ o.° .....                                   | 56    | 7  | 11 |       |    |    |
|                                                                  |       |    |    | 1943  | 12 | 11 |
|                                                                  |       |    |    | £4869 | 1  | 2  |
| Add 10 days on £4876 : 9 <i>s.</i> 8 <i>d.</i> .....             | 6     | 13 | 6  |       |    |    |
| Less, stamp.....                                                 | 1     | 5  | 0  |       |    |    |
|                                                                  |       |    |    | 5     | 8  | 6  |
|                                                                  |       |    |    | £4874 | 9  | 8  |
| July 31st.—Bill on <i>Jones, Lloyd &amp; Co.</i> , at 30 days .. | £4874 | 9  | 8  |       |    |    |

While the *Bewlah* was still at sea on her homeward voyage, and on or about 14th December 1841, *William Gemmell* wrote and sent to the said *Boggs, Taylor & Co.* a letter, of which the following is a copy:—

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“ Messrs. *Boggs, Taylor & Co.*

“ Glasgow, 14th December 1841.

“ Dear Sirs.—We addressed you on the 8th instant, since which we have not had the pleasure of hearing from you; and with reference to the communication made to us yesterday by your Mr. *Boggs*, we now write to request you will have the goodness to send us down, by return of post, the policy of insurance on the silks coming forward, per *Bewlah*, from Canton. The bill of lading for this silk will of course be handed over to us when it comes forward, we giving up cancelled a corresponding amount of your acceptances to us. It was our intention to return you enclosed your acceptance for 1000*l.*, due 3rd May, which we have not negotiated, but on further consideration we have resolved to retain it for the present.

“ (Signed) *Gemmell, Brothers & Co.*”

Not having received any reply to this letter, the said Messrs. *Gemmell, Brothers & Co.* wrote and sent a letter to the said Messrs. *Boggs, Taylor & Co.*, of which the following is a copy :

“ Messrs. *Boggs, Taylor & Co.*

“ Glasgow, 20th December 1841.

“ We addressed you on the 14th inst., and are surprised at not having heard from you in reply. We now again request you will have the goodness to send us down the policy of insurance on the silk, per *Bewlah*, from Canton, or inform us if the insurance has not been paid, for that if so, we may arrange about payment to the company to whom you gave the order, whose name you will please acquaint us with; requesting you will do so, as the favour of replying to this in course.

“ (Signed) *Gemmell, Brothers & Co.*”

On the 18th December the firm of *Boggs, Taylor & Co.* stopped payment.

On the 25th December 1841, the said *Wm. Gemmell* received a letter from the said *Mr. Taylor*, of which the following is a copy:—

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“ London, December 23, 1841.

“ Dear Sir.—Your letter of the 20th inst. is before me. I have just returned from Cheltenham, where obligation took me, and lose no time in answering your letter. In taking a glance at our transactions, I should certainly say all proceeds from China should go to you, and any balance on goods should go to the creditors, as these goods are especially against the bills accepted both by you and us. And as I have only time to save the post, I will write to-morrow, and endeavour to do every thing possible for your interest; but things done in a hurry often don't succeed. Rely on myself and partners attending to your interest. A short career ours,—two years.

“ (Signed) *Wm. Taylor.*”

Immediately after the time when the firm of *Boggs, Taylor & Co.* stopped payment, *Mr. George Broom*, an accountant, was employed to investigate their accounts and affairs, and he accordingly proceeded to do so; and a circular was addressed and sent by the said firm to their creditors, informing them of such failure, and convening a meeting of their creditors, which was accordingly held, and a committee was then appointed to inspect and direct their affairs until their accounts could be completely made up; and, in the meantime, the several members of the firm were required, by a letter written by Messrs. on behalf of some of the creditors of the said firm, to pledge themselves not to give preference to any of their creditors; and

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the several members of the firm gave such pledge accordingly.

Very early in the month of January 1842, the said *William Gemmell* being then in London, and being aware that the said return shipments of goods and teas on board the *Bewlah* were then on their homeward voyage, and might in the course of a few weeks arrive in the Thames, again applied to *Boggs, Taylor & Co.* to have the policy of insurance which they had effected on the said several shipments given up to him; and on the 5th or 6th January the said policy was delivered to him by the said *William Taylor*, after the following indorsement had been made thereon by the said *William Taylor* in the name of the said firm, that is to say, "In event of loss, pay to Messrs. *Gemmell, Brothers & Co.*, or order," signed "*Boggs, Taylor & Co.*" The said policy was thereupon handed by the said *W. Gemmell* to the firm of *A. A. Gower, Nephews & Co.*, who, as the London agents of *Gemmell, Brothers & Co.*, immediately took the policy to the office of the General Maritime Insurance Company (being the insurance company with whom such insurance had been effected,) and paid the premiums that were then due thereon, and at the same time procured the policy to be indorsed over to *Gemmell, Brothers & Co.* by the insurance company by an indorsement, which was as follows, (that is to say), "In case of loss, the same to be paid to *Gemmell, Brothers & Co.* For the General Maritime Assurance Company, *R. M. Raikes*, Secretary."

One part of each of the said bills of lading for the entire cargo of the *Bewlah* was sent by *W. & T. Gemmell & Co.* from China, by overland mail through India to the said firm of *Gemmell, Brothers & Co.* at Glasgow, who



received the same on the 12th January 1842; but *W. & T. Gemmell* never were directed, or in any manner authorized, by *Boggs, Taylor & Co.* to send to *Gemmell, Brothers & Co.* any of the bills of lading so as aforesaid indorsed to *Boggs, Taylor & Co.* On the 13th January 1842, *William Gemmell* cancelled the said indorsement to *Boggs, Taylor & Co.* on each of the said bills of lading so received at Glasgow, and delivered the same to the said *A. A. Gower, Nephews & Co.* in London, in order that the said shipment might be received and taken possession of by *A. A. Gower, Nephews & Co.* as the agents and on behalf of the said firm of *Gemmell, Brothers & Co.* But when *William Gemmell* so cancelled such indorsement, he had no authority whatever from the firm of *Boggs, Taylor & Co.*, or any one acting on their behalf, either to cancel or alter the same.

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About the 3rd February 1842, the said ship *Bewlah* arrived off Brighton, where she landed and posted her letters and papers, and then proceeded on her voyage to the Thames, and reached St. Katherine's Dock on Monday, the 7th February 1842.

On the same day, *A. A. Gower, Nephews & Co.*, having been apprized of her arrival, entered the said shipments of silks and teas in their name at the Custom House, and on the 9th of the same month they obtained possession of the silks, on production of the bill of lading thereof so indorsed to them as aforesaid. The right to the possession of the said teas and silks having been disputed, on behalf of the general creditors of *Boggs, Taylor & Co.*, Messrs. *A. A. Gower, Nephews & Co.* were not allowed to take possession of the teas, until they had given an indemnity, which they accordingly did, to the owners of the ship; and thereupon, on the 15th February 1843, the teas were delivered to and landed

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by *A. A. Gower, Nephews & Co.*, who immediately took possession of the same.

The whole of the silks were sold by *A. A. Gower, Nephews & Co.* on the 16th March 1842, and produced the sum of 1230*l.* 4*s.* 6*d.*; and part of the teas were sold by *A. A. Gower, Nephews & Co.* on the 4th of the said month, and the residue thereof on the 2d June 1842, and produced together the net sum of 1301*l.* 7*s.*

On the 1st March 1842, Messrs. *Boggs, Taylor & Co.* committed an act of bankruptcy, and on the 2nd March 1842 a fiat in bankruptcy was issued against them, and *William Pennell* is the official assignee, and *R. King, E. M. Daniel*, and *David Bellhouse*, are the creditors' assignees.

On the 17th September 1842 the assignees commenced an action in the Court of Queen's Bench against Messrs. *A. A. Gower, Nephews & Co.* for the recovery of the sum of 1278*l.* 6*s.*, being the proceeds of the silks, and the sum of 1359*l.* 9*s.* 6*d.*, being the proceeds of the teas.

The shipment of opium, which had been consigned from India on account of *Boggs, Taylor & Co.* to Messrs. *W. & T. Gemmell* of Canton, after having been held by them for a considerable time on hand, was eventually sold by them, and on the 3rd January 1842, *W. & T. Gemmell & Co.* transmitted to *Boggs, Taylor & Co.* a bill of exchange for the sum of 800*l.*, being part of the proceeds of the sale, and on the day of following, they remitted to *Boggs, Taylor & Co.* another bill for the sum of 3111*l.* 10*s.* 2*d.*, being the balance which they had received on account of the opium.

With reference to such remittances, Messrs. *W. & T. Gemmell & Co.* of Canton sent with the first of such bills

of exchange to *Boggs, Taylor & Co.* a letter of which the following is an extract :—

“ Macao.

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“ Mr. *H. Rustowjee* is about visiting Bombay, from his own account of your 50 Malava bills of exchange, *P. Larkenson*: *P. Larkenson & Co.* London, in favour of *H. Rustowjee* at six months' sight 1000*l.* at 5*s.* per 4000. To cover our outlay for freight and insurance, we have caused the above sum to be divided in two bills, one for 200*l.* and the other for 800*l.*; the latter we now enclose in your favour, and for which we debit you in account current 800*l.*

“ @ 5*s.* Ex 3200

Commission on Remittance,

1 % 32, . . S.3232 : 0 : 0

“ And, from your arrangement with *Gemmell, Brothers & Co.*, we beg to suggest that the amount of this bill may be applied to the liquidation of any bill, that may be on circulation between you and them. We remain, &c.

“ *W. & T. Gemmell & Co.*”

*Thomas Gemmell* died some time in the month of January 1842, and all his interests in the firm of *Gemmell, Brothers & Co.* are now vested in *W. Gemmell*, and *W. L. M'Phum*, his surviving partners.

The acceptances which *Gemmell, Brothers & Co.* gave to *G. Boggs*, amounting together to the sum of 2500*l.*, were not provided for by *G. Boggs*, and were not renewed, but on coming to maturity were taken up and paid by *Gemmell, Brothers & Co.*

The bankrupts having stopped payment, prior to the time when the two bills of exchange before mentioned for the sums of 3000*l.* and 2000*l.* respectively, and dated the 9th and 31st July respectively, came to maturity, Messrs. *Gemmell, Brothers & Co.* were in conse-

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quence thereof compelled to pay, and in fact paid, the amount of these bills. On making up the accounts by *Gemmell, Brothers & Co.* between themselves and the said bankrupts up to the 31st December 1842, it appeared, as *Gemmell, Brothers & Co.* alleged, that there was due from the said bankrupts at the time of their bankruptcy to Messrs. *Gemmell, Brothers & Co.*, reckoning the amount of the former acceptances for which Messrs. *Gemmell, Brothers & Co.* were liable, the sum of 4887*l.* 13*s.* 5*d.*

*Gemmell, Brothers & Co.* have since the bankruptcy paid a further sum of 48*l.* 1*s.* 6*d.* for the insurance of the silks coming home, and they have, in addition to such sums, also paid the said two acceptances given by them in favour of the said *G. Boggs*, amounting to the sum of 2500*l.* each; and they have also paid on his account the sum of 11*l.* for premiums and bank commission, together with a sum of 58*l.* 2*s.* 6*d.* for insuring on their homeward voyage the said teas by the *Bewlah*, making in the whole an aggregate sum of 2568*l.* 2*s.* 6*d.*, together with an arrear of interest.

On the 21st January 1843, *William Gemmell* and *William Lynn M'Phum*, being the surviving partners of *Thomas Gemmell*, deceased, and *Robert Frederick Gower*, *Abel Lewis Gower*, *Gregory Seale Walters* and *Edwin Gower*, preferred their petition to the Court of Review, and thereby stated, among other things, to the effect hereinbefore stated, and prayed, among other things, that it might be declared, that the said firm of *Gemmell, Brothers & Co.* were entitled to a lien upon the proceeds of all remittances and returns made by the said firm of *W. & T. Gemmell & Co.* at Canton to the said firm of *Boggs, Taylor & Co.*, in respect of the proceeds of the said bills and opium, and also of the said

shipments made by the said *G. Boggs*; and, in particular, that it might be declared that the said firm of *Gemmell, Brothers & Co.* were entitled to such a lien upon the aforesaid sum of 1278*l.*, being the proceeds of the said silks, and upon the said two several bills of exchange for 800*l.* and 3111*l.* 10*s.* 2*d.*, and the proceeds thereof, for the amount of their advances to the said *Boggs, Taylor & Co.*, in respect of the said *Boggs, Taylor & Co.*'s moiety of the said transaction and adventure, and also upon the proceeds of the said teas, so far as the same would extend, for the amount of their aforesaid advances to the said *G. Boggs*; and that accounts might be taken of what was due to the petitioners, and that the assignees might be restrained from prosecuting the said action at law.

The petition came on to be heard, and was argued on the 20th February 1843, when the Court of Review reserved its judgment on the matters in the petition, but refused to restrain the assignees from prosecuting the action at law, on the assignees undertaking to stay execution if they should recover judgment in such action.

On the 25th of February 1843 the action came on for trial at Guildhall, before Lord Denman and a special jury, when a verdict was given for the plaintiffs in the action, subject to a special case, with liberty for either party to turn it into a special verdict.

The petition was again mentioned before the Court of Review on the 1st and 3rd of March 1843, when all parties submitted all questions respecting the matters of the said petition, and also the disposal of the action at law, and the costs thereof, to the jurisdiction of the Court, to be subject, however, and without prejudice, to the right of afterwards appealing, by way of special case, if either of the parties should be so advised.

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The Court, after having taken time to consider its judgment, by an Order dated 6th March 1843, declared that the petitioners respectively did not before, or by means of, the alteration made upon the bills of lading, acquire any lien upon the consignments or remittances from China made to the said bankrupts, as in the said petition also mentioned, or any interest of that nature. And it was ordered, that the said petitioners should account for and pay over to the said assignees, (to be by them applied as part of the estate of the said bankrupts), all monies received by them the said petitioners, in respect of any such consignments or remittances. And that the said petitioners should pay to the said assignees their costs of and incidental to the said action, *Pennell and others v. Gower and others*, up to and inclusive of the 18th February last, when taxed by the proper officer. And the said assignees were to be paid out of the estate of the said bankrupts, when so taxed by the proper officer, all such costs of the said action as were not thereby ordered to be paid to them by the said petitioners and their (the assignees) costs of and incidental to the said petition.

The question is, whether, upon the facts hereinbefore stated, the aforesaid Order of the Court of Review is or is not erroneous, and whether, in particular, the said petitioners are, or are not, entitled to such lien as by the prayer of their aforesaid petition they claimed upon the proceeds of the said silks and bills of exchange and teas respectively, or upon some and which part of such proceeds.

*J. W. Mylne*, for the appellants.

*Henry Tennant*, for the respondents.

The following is a report of the argument in the Court of Review :

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Mr. *Swanston*, Mr. *Anderdon*, and Mr. *Mylne*, in support of the petition. The decision of the Court of Review in *Ex parte Prescott* (a), is strongly in favour of the lien claimed by these petitioners. In that case, *A.* supplied goods at his own cost to *B.* and *C.*, which it was agreed should be shipped on the joint account of the three, and that *A.* should draw bills on *B.* and *C.* on account of the return proceeds, he undertaking to renew the bills until funds came round, so as to keep *B.* and *C.* out of cash advances; *B.* and *C.* accepted the bills, and consigned the goods to their correspondent abroad, with directions to transmit the account of sales and the proceeds to themselves; *A.* discounted the bills with parties, who had no knowledge of the bills being drawn on account of the joint shipment, and were not made acquainted with that circumstance until after the respective bankruptcies of *A.*, and of *B.* and *C.*; and it was held that the bill-holders had, nevertheless, a lien on the return proceeds of the shipment, which came to the hands of the assignees of *B.* and *C.* subsequently to their bankruptcy. The same doctrine was held in *Ex parte Copeland* (b), where under similar circumstances it was held, that the proceeds of goods, which were agreed by the shippers to be applied in liquidation of certain bills, were clothed with a trust for the payment of the bills, and that the assignees of the shippers were bound to pay over the proceeds to the party who had discounted the bills. There is no suggestion in the present case, that any act of bankruptcy had been committed

(a) 1 Mont. & A. 316; 3 Deac. & C. 218.

(b) 3 Deac. & C. 199.

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by either of the bankrupts at the time of any of these transactions. There is no joint creditor of the several firms existing, and therefore the equities of each firm can be adjusted.

*Mr. James Russell, Mr. Wigram, and Mr. Tennant,* for the assignees. The petitioners have no claim in a Court of Equity, which they would not equally have in a Court of Law. A great deal has been said of the advances made by *Gemmell, Brothers & Co.* for the bankrupts; they made no advances, whatever sums they have paid in the result. They were not partners with the bankrupts in the adventure to India, nor had any joint interest in the profits; but merely accommodated each other with an acceptance to the amount of 5000*l.* We deny that there is any such agreement, as is contended for by the other side. Do any of the letters show it?

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—It all depends upon about sixteen words in the two letters of the 19th and 30th of January 1841. There is nothing else in the case. The acceptances which bought the India bills were divided; the India bills themselves were divided; and the produce of those bills was also divided.

*Mr. Russell, Mr. Wigram, and Mr. Tennant.* We rely on the letter from *Gemmell, Brothers & Co.* of the 30th January 1841, in which they expressly say, that, in order to keep the accounts distinct, “you will please consider the bill drawn at six months as exclusively intended to provide for your moiety of the transaction, and the one at four months for ours.” There was no contract between the parties, that either of them should



interfere with the other, as to the goods that were to come back from China. But if there is any doubt upon that point, it is a proper question to be decided by a jury, and the pending action between the parties is appointed to be tried on Friday next. After the bills of lading for the goods had been indorsed by the house of *W. and T. Gemmell & Co.* in China to *Boggs, Taylor & Co.*, *W. Gemmell* had no power to bind his copartners by the alteration he made in that indorsement; the rights of the parties must therefore stand, as if that act had not been done. The whole question is, whether there was an agreement to pay out of a particular fund; and that can only be collected from the correspondence between the parties. [The *Chief Judge*. Was it, or was it not, agreed between them, that the moiety of *Gemmell & Co.* in the India speculation was not to come into possession of *Boggs Taylor & Co.*, and that the moiety of *Boggs, Taylor & Co.* was not to come into the possession of *Gemmell & Co.*?] That, we submit, was the agreement between the parties. The transfer of the policy of insurance by *Boggs, Taylor & Co.* to *W. Gemmell* could hand over no interest in the goods; it could only be used as evidence of the contract. But we leave the contract to speak for itself.

*Mr. Swanston*, in reply. With respect to the bill for 1500*l.* drawn by the bankrupts upon *Gemmell, Brothers & Co.*, it is clear, from the letters of the 28th June 1841, and the 3rd July 1841, that the proceeds of the shipments by the *Bewlah* and the *Arethusa* were charged with the payment of it. The action at law could not decide the question on this petition; for in that action *Gower & Co.* are the defendants, not *Gemmell & Co.*

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In *Burn v. Carvalho* (a), the distinction is drawn between legal and equitable claims; and this case is within the distinction there drawn. In that case, consignments of goods were made by *B.* to *C.*, and bills drawn on the plaintiff on the credit of the goods generally, which the plaintiff was obliged to pay; and it was held, that the effect of the correspondence between the plaintiff and *B.* amounted, in equity, to a contract by *B.* that the goods remaining in *C.*'s hands should be an indemnity to the plaintiff for the bills paid, and that the plaintiff had consequently a lien on them for his debt. I beg to call the attention of the Court to a passage in the letter of the 19th of January, from *Gemmell, Brothers & Co.* to *Boggs, Taylor & Co.* It relates to the third article of the terms proposed of the adventure to China, and is as follows: "We think this a better mode of placing such a transaction than joint account, but should you differ with us, we will be happy to have your views; it serves the same purpose as regards saving outlay of money, puts the same amount of commission respectively into the foreign houses, and enables each party to give such instructions as to investment as may appear to them best." The petitioners could not take possession of the goods, until they had paid the bills. The contract was, that when there were sufficient proceeds, the bills should be paid.

The CHIEF JUDGE.—Considering the time when the action was commenced, the time when this petition was presented, and the state of the present proceedings, I think that I ought not to interfere to prevent the trial by any previous decision on the merits. As the cause will

so shortly be tried, it will be better that the judgment of the Court on this petition should await the decision in the action, when the points decided can then be specially adverted to; of course, on the understanding, that if judgment is obtained in the action, it shall not be enforced, until the case here is finally disposed of. I will therefore defer pronouncing my judgment until Wednesday week, when the result of the action will be known.

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N. B.—The action having been, in the mean time, brought on for trial, and a special case being reserved by the judge for the opinion of the Court of Queen's Bench, the parties agreed to submit the whole question between them, including the action, to the decision of this Court. His Honour thereupon delivered the following judgment :

March 8.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—In this case (subject only to the question of lien raised by the petition) the petitioners respectively have not, nor ever had, any beneficial interest, total or partial, in the goods or bills of exchange in question. Those goods and bills are the produce of certain goods sent from India to China, which were exclusively the property of the bankrupts, and had been purchased with bills remitted from England to India, also the exclusive property of the bankrupts. These last had, however, been procured by means of bills drawn or accepted in Scotland by the petitioners *Gemmell & Co.*, as sureties for the bankrupts, who were also, as acceptors, or drawers, parties to the bills. There was at the same time a similar transaction, or set of similar transactions, in which *Gemmell & Co.* were interested and concerned in the same manner as

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the bankrupts in the first transaction, or set of transactions; and the bankrupts were interested and concerned in the same manner as *Gemmell & Co.* in the first transaction or set of transactions. So, that, as to the bills which the bankrupts drew or accepted in the second transaction, or set of transactions, they did so as sureties for *Gemmell & Co.*, who were also parties, as acceptors or drawers, to the bills. It appears, that one motive, which induced *Gemmell & Co.* to engage in these transactions, was to secure the consignment to a house in China, in which one at least of their firm was a partner, of the goods to be purchased in India, which were all to go to that China house. But the goods, which with their proceeds were to be purchased in China, were, when purchased, to be at the absolute disposal severally of *Gemmell & Co.* and the bankrupts,—*Gemmell & Co.* having nothing to do with the bankrupts' portion of them, and the bankrupts having nothing to do with *Gemmell & Co.*'s portion of them. *Gemmell & Co.* have fulfilled all their obligations. The bankrupts have not fulfilled theirs; *Gemmell & Co.* having been obliged to pay those bills, in which they were sureties for the bankrupts; and the contention is, that *Gemmell & Co.* have, by way of lien, a right to be indemnified in this respect out of the goods consigned from China to the bankrupts, which were the produce of the bankrupts' portion of the India goods purchased in India, with remittances belonging to them, procured as I have mentioned.

The case, though one of cross suretyship, cannot I think be treated as one of partnership, or as analogous to partnership. There was a severance, throughout, of that which belonged to the bankrupts from that which belonged to *Gemmell & Co.* I think that there was no

joint adventure. *Gemmell & Co.* lent their money to the bankrupts, for the purpose of assisting the bankrupts in raising money for their adventure. The bankrupts lent their names to *Gemmell & Co.*, for the purpose of assisting *Gemmell & Co.* in raising money for their adventure. But, of course, the mere fact of *A.* lending his money or name to *B.*, for the purpose of enabling *B.* to buy goods for *B.*'s use, will not give *A.* a lien on those goods, when bought, for the debt. And in the present case the lien, or right in the nature of lien, claimed by the petitioners, cannot, as I conceive, be supported upon the mere facts, independently of express contract for the purpose, but, if existing at all, must, in my opinion, be founded upon express contract. Was there then any such express contract? In the letters of January and February 1841, or in some of them, there are expressions which have a tendency that way, and particularly the phrases "renewing them till the funds come home," and "till bills, or bills of lading, are received from China as remittances for such amount." But, taking the whole of the letters together, and especially considering the second article of the letter of the 19th January, and the entire letter of the 1st February from *Gemmell & Co.* to the house of *Hormajee*, I am of opinion, that the intention to be inferred from them is, that, subject only to the obligation of purchasing goods in China through the agency of the China house already mentioned, the adventure and goods of the bankrupts were to be under their control and in their power, in a manner inconsistent with the notion of any lien on the part of *Gemmell & Co.*; and the adventure and goods of *Gemmell & Co.* were to be under their control and in their power, in a manner inconsistent with the notion of any lien on the part of the bankrupts.

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The outlay of money was to be saved, by drawing and renewing bills—not by means of any lien, as I conceive. The renewals were to go on, until the funds should come home, that is, as I read the letter, until each firm respectively should be placed in funds, so as to enable it to dispense with the assistance of accommodation paper, but, according to my construction of the correspondence, without imposing an obligation upon either firm, to apply its own goods, or their proceeds, in any specific way. It appears to me, that neither firm thought of a lien on the goods of the other,—that they looked mutually to each other's general responsibility,—and not further. The letter of the 28th June, I think, leaves the matter of the consignments and transactions, which are the subject of the letters of January and February, as those letters left them, and means to place the transaction of the 1500*l.*, to which the letter of the 28th June particularly relates, and in which it now appears that *Boggs* was not alone, but that all the bankrupts were in truth, interested, on the same footing as the other transactions, and on none other. I do not forget the expression “on the shipments,” or the form of the bill for 1500*l.*, or the letters of the 28th June and 1st and 3rd July; nor do I question, that a bill of exchange may be so constructed, as to create a lien for its payment on specific goods. But, in the present case, my opinion is, that neither by the letters of June and July, nor by the bill for 1500*l.*, was any such lien, total or partial, as that which the petitioners claim, created. Mr. *Taylor's* letter of the 23rd December, and the indorsement and delivery of the policy, may show the view that Mr. *Taylor* took of the previous transactions. But I think, that, if his view was in favour of the existence of any lien, or analogous right,

that view was erroneous ; and considering the position in which Mr. *Taylor* then stood,—the circumstances under which the letter was written, and the indorsement and delivery of the policy took place,—and the nature of that last transaction,—a right for the present purpose not otherwise existing was not created by it, or by the letter ; nor am I of opinion that the petitioner's case can, in this Court at least, be considered as affirmed or advanced by the erasure in this country from some of the bills of lading of the indorsement made in China, and the substitution of another, or by what Messrs. *Gemmell* did in consequence.

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Such is my view of the matter before me. To that view, also, at the close of the argument, my opinion inclined. I thought it right, however, to consider the case further ; and under all the circumstances, the respondents then desiring to proceed with the pending action, but not to issue execution without the leave of the Court, it seemed to me due to them, to allow that action (in which the pleas, issue, and notice of trial had been delivered more than two months before the presentation of this petition) so to proceed. It was accordingly afterwards tried, and the result was a special case, or a special verdict, which, leaving every point of law and equity still open, the parties then agreed to submit the whole question between them, including the action, to this jurisdiction ; and it is not without having subsequently reviewed the entire case, that I have now declared the opinion already expressed upon its merits.

The Order, after reciting the submission by the parties of the entire question, and of the action, to this jurisdiction upon the present petition, must be, to declare,

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that the petitioners respectively did not before, or by means of, the alteration made upon the bills of lading, acquire, and have not, any lien upon the consignments or remittances from China made to the bankrupts, or any interest of that nature; and to direct the petitioners to account to the assignees accordingly; to give no costs of the petition on either side, except that the assignees will take theirs out of the estate; to direct the costs of the action up to the 10th February last, inclusive, to be paid by the defendants at law to the plaintiffs at law, and to give no subsequent costs at law to either party, except that the assignees are to take theirs out of the estate.

6, 7 & 13 Nov.
cor. Lord
Chancellor.

From the above decision the petitioners appealed to the Lord Chancellor; and the matter now came before his Lordship on a Special Case, a copy of which is given at the beginning of this report.

Mr. *Swanston*, Mr. *Anderdon*, and Mr. *Mylne*, for the appellants.

In the Court below, the case was put on the footing of there being no express contract for a lien. It was not adverted to in the judgment of the Vice-Chancellor, that, before the bills were renewed, the London house had stopped payment. It plainly appears from the correspondence between the Glasgow and the London house, that any outlay of money by *Boggs & Co.* was to be saved by *Gemmell & Co.* negotiating bills drawn by them upon *Boggs & Co.*, and renewing them until funds came home from China for the payment of the bills. It is clear also

from the statement of the special case, that 5000*l.* has been paid by the Glasgow firm on account of the London firm.

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The LORD CHANCELLOR.—Suppose, without any thing more, there had been a loan of 5000*l.* from *Gemmell & Co.* to the London house, to be invested in a particular speculation to China, would that give a lien to *Gemmell & Co.* on the proceeds of the adventure received by the London house from China?

Mr. *Swanston*. We submit that it would. But, in this case, both the parties looked to the arrival of the goods for the payment of the bills, which were to be renewed from time to time until the parties were enabled finally to pay the bills by the proceeds of the adventure to China.

The LORD CHANCELLOR.—Suppose the goods had arrived before the bills became due, and the London house had been insolvent, could *Gemmell & Co.* in that case have claimed the goods?

Mr. *Swanston*. The London firm did, in fact, stop payment, before the bills were to be renewed; but the renewal then would have been idle; for they could no longer be looked to for payment of the bills. How then could the bills for the amount of their portion of the adventure be paid, but by the proceeds of the goods from China?

The LORD CHANCELLOR.—If one party says to another, “I could lay out a sum of money in an advantageous speculation to China,—will you lend me 5000*l.*

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for that purpose, to be repaid on the arrival of the shipment from China?"—Would a compliance with that request by the other party give him a lien on the return cargo, without an express contract to that effect? Does the proposal by the party, as to the mode of discharging the debt, amount to any thing more than a stipulation as to the *time* of repayment?

Mr. *Swanston*. The contract here is, that the bills were to be renewed, until the Glasgow house were enabled to pay them, by being put in funds for that purpose by the arrival of the goods from China. Where the payment therefore depends upon an event which will provide the means of payment, the contract does something more than merely limit a time for that purpose. The way in which the question was put to the Court below, on the part of the assignees, was, that there was no specific engagement of *Boggs & Co.* in the letter of the 26th January, that the Glasgow house should have a lien on the funds. But, in the subsequent letter of the 30th January 1841 from the Glasgow house to *Boggs & Co.*, they thus express themselves: "We agree to save cash outlay, by renewing the bills drawn to-day till bill or bills of lading are received from China, as remittances for such amount." It is clear from the passage in this letter, that the proceeds of the goods from China were the funds that were relied on for payment of the bills. The judgment of the Vice-Chancellor does not cover the whole region of discussion then before the Court. Without any express contract for a lien, it is sufficient for us to show, that the understanding of the parties, as collected from their correspondence, was, that *Gemmell & Co.* were to look to the proceeds of the goods for the payment of the bills.

The mere renewal of bills until a given time or period, may be very different from a renewal depending on the arrival of a fund to provide for the payment of the bills.

On the other point, as to the bill for 1500*l.*, there is an express contract that the bill was drawn on *Gemmell & Co.* on the shipment by the *Bewlah*. This appears from the letter of *G. Boggs* of the 28th June 1841; and the letter also of *Gemmell & Co.* of the 29th June refers to a bill for 1500*l.* drawn against goods by the *Bewlah*; and *G. Boggs* sends the invoice of these goods to *Gemmell & Co.* [The *Lord Chancellor*. That was merely to satisfy them that there had been a shipment.] There is another material fact in the case, namely, the forwarding of the policy of assurance to the Glasgow house. That was done certainly after the stoppage of payment, but before the act of bankruptcy. [The *Lord Chancellor*. You can only use that as evidence of what the parties intended.] The construction we put upon that is, that it was done in pursuance of what the parties had previously agreed, and shows that the lien of *Gemmell & Co.* was acknowledged.

In conclusion, I beg to call the attention of the Court to a few cases in support of the proposition we are contending for. In *Ex parte Copeland* (a), which was a very similar case to the present, the memorandum of agreement between the parties declared that the goods were shipped on their joint account, each one-half share; and one of the parties engaged to provide the other with funds to meet his proportion, as the bills (which were drawn for the amount of the goods) fell due, and also to renew their own proportion of one-half, until such times as the returns come home; and this was held to

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(a) 3 Desc. & C. 199.

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establish a lien on the return proceeds of the goods for the payment of the bills. The question there was not determined on the ground of partnership. So in *Ex parte Prescott (a)*, which was another case in the same bankruptcy, and in which the same point was determined, the Chief Judge said, it was immaterial to consider whether there was a partnership or not between the parties, or whether it was a mere sale by one to the other; for that, at all events, there was an agreement in the nature of a pledge for a specific appropriation of the proceeds of the shipment to the payment of the bills, which were accepted by one of the parties in consideration of the goods composing that shipment. *Ex parte Gledstones (b)* occurred in the same bankruptcy as the present case, and it is difficult to distinguish the principle on which a different decision was come to in that case. There *B., S. & Co.* of Calcutta, having consigned certain goods to *G. B.* in England, on which they had a lien for the price, wrote him word that they intended to draw in favour of *G., K. & Co.* for the balance of such shipments, and that they enclosed bills of lading and policies of insurance for the goods in question; and they also drew a bill for the amount on *G. B.*, in favour of *G., K. & Co.*, which they directed *G. B.* to "place to account of shipments per *Gardner*." *G. B.* having become bankrupt before the goods reached England, they came to the possession of his assignees; and it was held, that the expressions in the bill and the letter amounted to a specific appropriation of the goods for the payment of the bill, and that the assignees were bound to account to *G., K. & Co.* for the proceeds. The Vice-Chancellor *Knight Bruce*, in delivering his judgment

(a) 3 Deac. & C. 218.

(b) 3 Mont. Deac. & D. 109.

in that case, said, that the claim of *G., K. & Co.* to a lien on the goods did not rest upon the letter alone, emphatic as was the expression contained in the post-script, "for," he observed, "when we come to the bill itself, we find also these words, 'which place to account of shipments per *Gardner*.' Now it appears to me, that, as between drawer and drawee, this was a specific appropriation of particular funds for the payment of the bill;" "and," he added, "the interpretation which I think most consistent with justice, most consistent with fair dealing, and with mercantile custom, is, that the bill should be paid out of the shipments by the *Gardner*." Now, we beg to call in aid that reasoning to the present case. Here, in the body of the bill the words occur, "goods per *Bewlah*," on account of which it purports to be drawn. [The *Lord Chancellor*. There is a distinction between that case and this. Here the letter of the 28th June 1841 from *G. Boggs*, enclosing the bill, says, "of course *Boggs & Co.* will put you in funds for this draft; it being understood, we mutually keep each other out of cash outlay, in our transactions with your house in China."] *Ex parte Waring* (a), and that class of cases, are authorities for exercising an equity in favour of bill-holders, which would not arise if the parties had continued solvent.

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Mr. *Anderdon*, and Mr. *Mylne*, on the same side. With respect to the 5000*l.* remitted to China for investment in the purchase of goods there by the Canton house, to be consigned by them to England,—there is no question but that this must be dealt with as a joint adventure; and there is also no question as to the identity of any

(a) 2 *Rose*, 182; 19 *Ves.* 345.

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of the returns of the produce of the silks shipped by the Canton house. Now, in the common case of a joint adventure for the purchase of goods, it is consistent with the acknowledged principles of equity, that neither party should profit by the proceeds of the adventure, until each has indemnified the other for the price of the goods purchased. In the present case, therefore, the funds arising from the proceeds of the silks are liable to discharge the outlay incurred by the price. The agreement between the parties was, that *Gemmell & Co.* were to keep the bills current, until funds came home for the payment of them. In *Ex parte Prescott (a)* the expression in the letter of the party who drew the bills is nearly the same as in the present case, the drawer there engaging "to renew the bills until funds came round;" and it really seems quite impossible to distinguish that case from this. In regard to the bill for 1500*l.* drawn by *G. Boggs* on *Gemmell & Co.*, that was an isolated and distinct transaction, except as it may show what the understanding of the parties was, as to the provision for the payment of the bill for 5000*l.* in the first transaction.

Mr. *James Russell*, Mr. *L. Wigram*, and Mr. *Tenant*, for the respondents. None of the cases cited by the other side have any bearing upon the question in this case. They affirm nothing but the law of partnership and of lien, as recognized in *Ex parte Waring (b)*. In *Ex parte Prescott (a)* it was a special partnership; but if you throw out entirely the question of partnership, there was in that case a specific agreement, that the bills should be paid out of the return proceeds, when they

(a) 3 Deac. & C. 218.

(b) 2 G. & J. 404; 2 Rose, 182; 19 Ves. 345.

should arrive. It is a mistake, therefore, to suppose that the question in that case arose on the construction of the letter. In that case, as well as in *Ex parte Copeland*(a), it is clear that the goods were to be applied to discharge the joint liabilities. In the present case, there is an absence of any expression in the correspondence between the parties, that can possibly raise a contract for a lien on the goods for the payment of the bills. Here each party lends his name to the other to raise the sum of 10,000*l.*; one bill *Gemmell & Co.* were to provide for; the other *Boggs & Co.* were to provide for. Neither of the parties here gives the other the slightest control in the management of the transaction, or the application of the funds.

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The LORD CHANCELLOR.—The expression in the correspondence relied on by the other side is, “that the bills were to be renewed, until the funds came home,” and “to save cash outlay by renewing the bills, until bills of lading are received from China.” But is the transaction more than this—we want to raise this money, without making any cash advances, providing for the payment of the bills, as soon as the arrival of the goods from China will enable us to do so? Then with regard to the 1500*l.* bill, besides the expression in the bill, they rely on the expression contained in the letter of *Gemmell & Co.* of the 29th September 1841, wherein they say, “We enclose a bill for 1500*l.* drawn *against* goods per the *Bewlah*.” Now what is the meaning of the word “*against*” in commercial transactions? If I send goods from India to England, and draw *against* the goods, I

(a) 3 Deac. & C. 199.

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draw on the consignee to accept bills in respect of my own goods thus consigned to him.

Mr. *L. Wigram*, and Mr. *Tennant*. They say also on the other side, that the inducement for *Gemmell & Co.* to renew the bills, was, that they were to have a lien on the return cargo for the payment of them. We wholly deny that any portion of the correspondence warrants that construction. The inducement for the renewal of the bills was, merely, that each party should render accommodation to the other.

Mr. *Anderdon*, in reply.

Cur. ad. vult.

Westminster,
Nov. 13.

The LORD CHANCELLOR.—This was an appeal against the decision of Vice-Chancellor *Knight Bruce*, acting as Chief Judge of the Court of Review. The facts of this case are shortly these. *Gemmell & Co.* the petitioners, were merchants at Glasgow, and *Boggs, Taylor & Co.* at the same time carried on business in London. *W. & T. Gemmell & Co.* also carried on a separate business at Canton, in China. By an arrangement made partly by correspondence, and partly by personal communications, it was proposed that Messrs. *Gemmell & Co.* of Glasgow, should draw bills for the amount of 10,000*l.* on Messrs. *Boggs, Taylor & Co.*, which being accepted by them, the discount of them should be procured by Messrs. *Gemmell & Co.* of Glasgow. This was accordingly done; the bills were drawn, and the discount of them on behalf of *Boggs, Taylor & Co.*, was procured by Messrs. *Gemmell & Co.* of Glasgow. The money thus obtained, was divided into two portions of 5000*l.* each, one of which

was retained by *Gemmell & Co.* of Glasgow, and the other received by *Boggs, Taylor & Co.* The object of each house was to send the money through India to Canton, to be laid out there by *W. & J. Gemmell & Co.*, as the agents of *Gemmell & Co.* of Glasgow. The Glasgow house agreed to save any cash outlay, by renewing the bills so drawn on the London house, till bills of lading were received from China as remittances for cash amount, the London house giving instructions to the Canton house for the investment of their moiety, and the Glasgow house doing the same for theirs. Thus each adventure was a distinct transaction; the only stipulation being for the benefit of the Canton house, who were to lay out the money. The goods, which were purchased with the proceeds of the bills in China, were accordingly transmitted from thence to England, one portion to the Glasgow house, and the other to the London house. On these goods advances were made by *W. & T. Gemmell & Co.* of Canton, both to *Gemmell & Co.* of Glasgow, and to *Boggs & Co.*; but from the time of the division of the fund, neither house interfered with the disposal of any part of it, except its own portion. There was nothing in the original transaction to give either house a lien on the goods purchased, nor is there anything in the subsequent correspondence between the parties to show their intent that such lien should be created. Reliance has been placed on the wording of the third article contained in the letter from the Glasgow house of the 19th January; where it is said, that the outlay of money was to be saved to either party, by the Glasgow house negotiating their drafts upon *Boggs & Co.*, and renewing them till the funds came home. But there was no appropriation of the goods to the discharge of the bills,

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nor is there any thing in the correspondence to lead to that conclusion. As far as relates to the goods purchased with the money sent by *Gemmell & Co.* of Glasgow, no question arises. The sum of 5000*l.* remitted by *Boggs, Taylor & Co.*, was invested in silk, the bill of lading for which was indorsed by *W. & T. Gemmell & Co.* of Canton, to *Boggs, Taylor & Co.* The silk arrived in England, after an act of bankruptcy committed by *Boggs, Taylor & Co.* A bankruptcy ensued, and a dispute arose between the assignees and *Gemmell & Co.*, who claimed a lien on the silk for the amount of the bills. I think they had no such lien. There had been nothing more than an agreement on the part of *Gemmell & Co.* to lend their name to *Boggs & Co.*, by renewing the bills until the goods came home. It was merely an accommodation transaction, on a stipulation that there should be a credit to a certain extent; and *Boggs & Co.* only wanted the funds to come home to enable them to take up their portion of the bills. There is no ground to infer that the parties did not rely on each other's personal credit. It appears to me, therefore, that there was no specific appropriation of the goods for the liquidation of the bills.

With respect to the second transaction, as to the bill for 1500*l.*,—it appears that in June 1841, *G. Boggs* shipped a cargo of goods by the *Bewlah*, which were consigned to *W. & T. Gemmell & Co.* at Canton for sale, and the proceeds of which they were to lay out in the purchase of other goods to be consigned to the house of *Boggs & Co.* in England. *Boggs*, after this shipment, wrote the letter of the 28th June 1841 to the Glasgow house, reminding them of their undertaking to keep *Boggs & Co.* out of any cash advance on their shipments to the house in China, and draw a bill on the Glasgow

house for 1500*l.* on the shipment; adding the following postscript to his letter: "Of course *Boggs & Co.* will put you in funds for this draft, it being understood we mutually keep each other out of cash advances on our transactions with your house in China." The house in London therefore were to take up this bill, when it became due; and the terms of this contract were admitted by the Glasgow house, by their accepting the bill. Then, was this anything more than an accommodation bill accepted by the Glasgow house, for the purpose of keeping *Boggs & Co.* out of cash advances? The teas which were consigned by the house at Canton to *Boggs & Co.*, in return for their shipment by the *Bewlah*, were never under the control of the Glasgow house, but were consigned direct from China to *Boggs & Co.* There is nothing in this transaction, therefore, to constitute a lien of *Gemmell & Co.* on the return cargo, or to raise any claim for an appropriation of the proceeds for the payment of the 1500*l.* bill. But some reliance was placed at the bar on an expression in the letter of *G. Boggs* of the 28th June 1841, wherein, after saying that he has drawn a bill for 1500*l.* on account of the shipment to the house at Canton, he adds, "as I put it in the bill against the above, it will appear a transaction of mine, and not mixed up with the London house." But this expression must be construed with reference to the shipment. Does it in fact amount to more than this, "I have drawn a bill on account of that shipment, and I have put on the bill a memorandum that it is drawn on account of that shipment?" This does not give a lien to *Gemmell & Co.* on the return cargo, but only shows that *G. Boggs* intended to identify the transaction, and keep it separate from the transactions of the London house. It appears to me, that there was no appropriation of the

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teas consigned from China for the payment of this bill. The Vice-Chancellor's decision, therefore, must be affirmed, without costs on either side, the assignees taking theirs out of the estate.

Lincoln's Inn,
Feb. 26.

Ex parte PERRY.—In the matter of COLLINS.—

There must be some actual deposit, to constitute an equitable mortgage. An order on a third party to deposit a lease, when executed, is not sufficient.

THIS was a petition of the public officer of the Devon and Cornwall Banking Company, for the usual Order on an equitable mortgage. It appeared that the bankrupt had contracted with a party for a lease of certain premises, and that, when the lease was about to be granted, he gave notice to the intended lessor to place the lease, when executed, in the hands of the banking company as a security for a debt.

Mr. *Bacon*, in support of the petition.

Mr. *Hallett*, *contrà*.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.— There is here no deposit of any thing whatever, to constitute an equitable mortgage. It is only a case of actual deposit, that excludes the operation of the Statute of Frauds. The rights of all these parties are concluded at the time of the bankruptcy. I think I can make no Order, under these circumstances. But if the petitioner's counsel wishes to look into the authorities, the matter may be mentioned again. Subject to that reservation, the petition must be dismissed, but without costs.

Ex parte GLAISTER.—In the matter of MARTIN.—

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*Lincoln's Inn,
Feb. 26 and
March 1.*

THIS was the petition of one of the assignees, praying that it might be referred to the Registrar to tax the solicitor's bills of costs; namely, one up to the choice of assignees, two up to the audit, and three others subsequent to the audit.

The provision of the 3 & 4 Will. 4. c. 47. s. 8., enabling the Court of Review to refer bills of costs to be taxed by the Registrar, is confined to such bills as are directed to be taxed by the 1 & 2 Will. 4. c. 56. s. 5; and the directions of the last mentioned act apply only to "costs of suit between party and party in the Court of Review." Other bills of costs, therefore, must still be referred for taxation to a Master in Chancery.

Mr. Bacon, in support of the petition.

Mr. Anderdon, for the other assignee.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Upon looking at the enactment of the 3 & 4 Will. 4. c. 47. s. 8., I doubt my power to refer these bills to the Registrar for taxation, instead of sending them to a Master in Chancery. The eighth section declares that it shall be "lawful for the said Court of Review to order that any costs, which by the said secondly recited act are directed to be taxed by one of the Masters of the High Court of Chancery, shall and may be taxed by one of the Registrars, or Deputy Registrars, of the said Court of Bankruptcy." Now the "secondly recited act" referred to by this section is the 1 & 2 Will. 4. c. 56., and the directions for the taxation of costs given by the fifth section of that act apply only to "costs of suit between party and party in the Court of Review." It is certainly a defect in the wording of the 3 & 4 Will. 4. c. 47, s. 8., if it was the intention of that act, as most probably it was, to enable the Registrar to tax *all* costs which might have been previously taxed by a Master; but I am bound by the restrictive words of the 1 & 2 Will. 4. c. 56., and therefore can only refer these bills for taxation to a

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Master in Chancery, under the provisions of the 6 Geo. 4. c. 16. s. 14. The petition had better stand over, in order that it may be amended, by praying for a reference to a Master in Chancery, instead of the Registrar, to tax the bills of costs.

March 1.

Mr. *Bacon* now said, that the necessary alteration had been made in the prayer of the petition; and referred to the Lord Chancellor's General Order in Chancery of the 26th October 1842, rule 9, which directs, that bills of costs formerly taxed by a Master in Chancery shall now be taxed by the taxing Master. It is clear, that the Court has authority to order these bills to be taxed, under the general provision of the 6 Geo. 4. c. 16. s. 14., which declares "that any creditor who shall have proved to the amount of 20*l.* or upwards, if he be dissatisfied with such settlement by the Commissioners, may have any such costs and bills settled by a Master in Chancery." But, independently of the provisions in the acts of parliament, this Court has a general jurisdiction to refer the bill of any solicitor of the Court for taxation; *Ex parte Copeland*(a). And by the 1 & 2 Will. 4. c. 56. s. 10., all the laws and statutes in force concerning attornies and solicitors are declared to extend to attornies and solicitors practising in the Court of Bankruptcy; and by sect. 16 it is also declared, that all the laws and statutes, rules and orders, relating to bankrupts or to proceedings under commissions, or to the persons concerned therein, or in any way affected thereby, shall in like manner extend in every respect to that act, and to fiats issued in pursuance thereof, and to all proceedings under the same, and to all persons con-

(a) 4 Deac. & C. 86.

cerned therein, or in any way affected thereby, to all intents and purposes whatsoever.

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Mr. Bagshawe, contra. The object of this petition is to skreen the conduct of the petitioner, as one of the assignees under the fiat, and to harass the solicitors, by subjecting them to an examination, after their bills have been already regularly taxed by the Commissioners.

Mr. Bacon, in reply. It is not because the solicitor's bills have been already taxed by the Commissioners, that they are not subject to re-taxation. And, with respect to their liability to be examined, it is expressly provided by the 6 *Geo.* 4. c. 16. s. 33., that the Commissioners may summon before them for examination any person whom they believe capable of giving information concerning the person, trade, dealings, or estate of the bankrupt, or any information material to the full disclosure of the dealings of the bankrupt.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I think that I have power to refer these bills for taxation by a Master in Chancery, under the provisions of the 6 *Geo.* 4. c. 16. s. 14.; and, besides the liability of the solicitors to be examined before the Master on the subject of such taxation, I am of opinion, that the Commissioner has full power to examine the solicitors as to the bankrupt's property. The Order will be, therefore, that the bills shall be referred to a Master for taxation, but that such taxation shall be postponed, until the solicitors are summoned before the Commissioner.

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A. borrows money of B. & Co., country bankers, on his promissory note, which they deposit indorsed, along with other bills and notes, with W. & Co., their London agents, to secure the payment of advances. B. & Co. become bankrupt, when A. held notes issued by their bank more than sufficient to discharge the amount of his promissory note; and W. & Co. also held bills and notes of B. & Co. to a greater amount than the balance due to them from B. & Co. W. & Co. compel A. to pay to them the amount of his promissory note, and refuse to allow him to set off the notes he held of B. & Co.; and A., not knowing

Ex parte THOMAS STADDON.—In the matter of AYSHFORD WISE, NICHOLAS BAKER, and WILLIAM SEARLE RENTALL.—

THIS was the petition of a creditor to withdraw a proof, and to be remitted to his right of set-off.

The bankrupts had traded as bankers at Newton Abbot, in Devonshire, where their house was known as "The Newton Bank." The fiat issued against them on the 20th July 1841.

In November 1840, the Newton Bank advanced to the petitioner the sum of 500*l.* upon the security of the petitioner's promissory note, dated the 7th November 1840, payable on demand with lawful interest. On the 17th July 1841, the bank stopped payment, when the petitioner held notes of the bank and interest notes to the amount, with the interest due on the notes, of 581*l.* 5*s.*, being more than sufficient to have paid and discharged the petitioner's promissory note and interest; and he had in fact collected such notes together, expressly for the purpose of taking up and paying his promissory note with a part of these notes of the bank; for which the petitioner alleged, that he had given, previous to the stoppage of the bank, full value. It appeared that the petitioner's promissory note for 500*l.* was then in the hands of Messrs. *Williams, Dea-*

not knowing that W. & Co. held sufficient securities to discharge the balance due to them from B. & Co., proved under the fiat for the amount of the notes which he held of B. & Co. The assignees of B. & Co. then pay W. & Co. the amount of the balance due to them, after receiving credit for the sum paid by A. in discharge of his promissory note, and take out of W. & Co.'s hands all the remaining securities. Held, that, as A. would have had a right of set-off against the bankrupts, if they had continued in possession of his promissory note, he was not to be deprived of this right by his ignorance of the state of the account between W. & Co. and the bankrupts, and that the assignees were therefore bound, on the withdrawal of his proof, to repay him the amount of his promissory note, on his giving up the bankrupts' notes to the same amount.

con & Co., of Birchin Lane, London, bankers, who were the London agents or correspondents of the bankrupts, and with whom the note had been deposited by the bankrupts along with other securities, for the purpose of securing to *Williams, Deacon & Co.* such sums of money as they might lend, advance, or pay to or for the bankrupts, or which might be or become due to them on the balance of their account with the bankrupts. The petitioner alleged, that the note was deposited with *Williams, Deacon & Co.* only for the purpose of securing to them such balance, and that they were not absolutely entitled to the note, but merely held the same in the character of mortgagees (a). On the 28th July 1841, which was shortly after the date of the fiat, the petitioner, being applied to by *Williams, Deacon & Co.* for payment of the note, caused the amount to be tendered to them in a part of the notes which he held of the Newton Bank, but they refused to receive the same, or to deliver up the promissory note.

The petitioner, having subsequently received a letter from the solicitors of *Williams & Co.* applying for payment of the note, showed the letter to Mr. *Hernaman*, one of the assignees, and requested his interference to obtain time, in order that the petitioner might be enabled to take the necessary steps for the payment of the note; but the assignee told him that time could not be granted, that the assignees could do nothing for him, and that *Williams & Co.* had not securities in their hands of sufficient value to secure the repayment of the debt due to them from the bankrupts, that he had no doubt that *Williams & Co.* would have to prove against the estate of the bankrupts,

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(a) The above allegation was not in the petition originally framed, but was inserted afterwards by way of amendment.

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and that there was no chance for the petitioner but to pay the money; whereupon the petitioner, trusting to such representation, on the 7th December 1841, paid to *Williams & Co.* the amount of the note, and also the sum of 23*l.* 18*s.* 11*d.* for interest thereon, amounting together to the sum of 523*l.* 18*s.* 11*d.*, whereupon they delivered up to the petitioner his promissory note.

The petitioner alleged, that, in the belief that *Williams & Co.* did not hold sufficient securities to discharge the debt due to them from the bankrupts, he, on the 10th September 1841, proved the several notes of the said bankrupts of which he was the holder, amounting, with interest, to the sum of 581*l.* 5*s.*, under the fiat, but that had not yet received any dividend thereon, or voted in the choice of assignees.

Williams & Co. gave to the assignees of the bankrupts credit for the amount of the promissory note and interest; and, within two or three weeks after the petitioner had paid the same, the assignees paid *Williams & Co.* the balance of the debt then due to them, and took out of their hands all the securities which they then held.

The petitioner alleged, that, since such payment so made by him to *Williams & Co.*, he had discovered that at the time when such representation was made to him by Mr. *Hernaman*, *Williams & Co.* held securities, which were much more than amply sufficient for securing to them the repayment of all such sums as were then due to them from the bankrupts, and that Mr. *Hernaman* was well aware of the fact. And that, by means of such representations, the petitioner was induced to pay the sum of 500*l.* and interest so secured by the said promissory note, and to prove what was due to him as the holder of the bankrupts' notes under the fiat, instead of setting off

(as he had been advised he had a right to do) what was due to him from the bankrupts against the sum of 500*l.* and interest so secured by the petitioner's promissory note. The petitioner insisted, that *Williams & Co.* acted in the transaction at the request of, and as the agents of, the assignees; and that, if the assignees had informed the petitioner of the true state of the account of the bankrupts with *Williams & Co.*, the payment made by the petitioner to them in discharge of the promissory note would not have been made. That the estate of the bankrupts had benefited to the extent of the payment of the sum of 523*l.* 18*s.* 11*d.* by the petitioner to *Williams & Co.*, inasmuch as the assignees paid to them so much less in discharge of their debt due from the bankrupts. That among the securities given up by *Williams & Co.* to the assignees were those of several persons who held notes of the bankrupts, or to whom they were indebted on accounts current; in all which cases one debt was allowed by the assignees to be set off against the other, as the petitioner submitted ought to have been done in his case. That the securities, which were so given up by *Williams & Co.* to the assignees had (with the exception of those in which a set-off had been allowed) since been realized by the assignees, and had produced a much larger sum than the balance so paid by them to *Williams & Co.*, and the said sum of 523*l.* 18*s.* 11*d.* That the petitioner had, at various times since the payment to *Williams & Co.* of the said sum of 523*l.* 18*s.* 11*d.*, and since the discovery by the petitioner of the state of accounts between them and the assignees, made application to the assignees for repayment to him of the said sum, and requested that the debt of 581*l.* 5*s.*, so

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proved by the petitioner, or so much thereof as amounted to the sum so paid by him to *Williams & Co.*, might be expunged from the list of proofs under the fiat, and that the petitioner might remain a creditor under the bankruptcy for the difference only between those respective sums; the petitioner offering to give up to the assignees so many of the interest notes and bank notes of the Newton Bank, as would amount to the sum of 523*l.* 18*s.* 11*d.*; but the assignees declined to accede to such offer.

The prayer was, that the proof for the sum of 581*l.* 5*s.* might be expunged; and that the assignees might be ordered to refund to the petitioner the sum of 523*l.* 18*s.* 11*d.* paid by him to *Williams & Co.*, and by them accounted for to the assignees, the petitioner being ready and willing to deliver up to them the said promissory note; and that the petitioner might be declared entitled to set off, against the amount due for principal and interest on such promissory note, a sufficient portion of the bank and interest notes of the bankrupts in his hands, and be at liberty to prove for the balance due on such bank and interest notes; and that the assignees might be ordered to pay to the petitioner the costs of the application.

Mr. *James Russell*, and Mr. *Shebbeare*, in support of the petition. The petitioner was in the nature of a surety, only, for the payment of the promissory note to *Williams, Deacon & Co.* If the note had been in the possession of the Newton bankers at the time of their bankruptcy, it is quite clear that the petitioner would, in that case, have been entitled to set off the bank notes. Then as, by the payment of the note by the petitioner

to *Williams & Co.*, the debt of the bankrupts to *Williams & Co.* is to that amount diminished, the assignees are bound to return to the petitioner the amount which he paid to *Williams & Co.* in discharge of the note; for the note was only deposited by the bankrupts with *Williams & Co.* in the nature of a mortgage; it was not absolutely transferred to them.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Where is it alleged in the petition, that the promissory note was only mortgaged to *Williams & Co.*? If there is no such allegation, the petition must be amended.

*Note:* The petition, being defective in this respect, stood over for the purpose of having such an amendment introduced into it, and came on again this day for hearing. March 16.

Mr. *J. Russell*, and Mr. *Shebbeare*, renewed their former argument in support of the petition.

Mr. *Anderdon*, and Mr. *Bacon*, for the assignees. This is certainly a case of very great importance; as, if it is decided in favour of the petitioner, it may influence several other persons to make similar claims against the estate of the bankrupts. The 50th section of the 6 Geo. 4. c. 16 does not apply to this case; for that section refers only to mutual debts and credits between the bankrupt and any other person; and here there was no debt due to the bankrupts, it having been transferred by them to *Williams & Co.* The petitioner was therefore barred from any relief under the 50th section;

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which points only to a case where the debtor and the bankrupt are solely interested, and not to any debt or credit between the debtor and a third person. The note was given by the petitioner to the bankrupts, in return for advances made by them, and was to all intents a negotiable instrument. It was indorsed over by them to *Williams & Co.*, in the ordinary way of mercantile dealing, the bankrupts having therefore no longer any control over it; and *Williams & Co.*, as indorsees, demanded the payment of it from the petitioner, as the maker. Between the time of such demand and the payment of the note by the petitioner, he proved the amount of the notes of the Newton bank which he had in his possession. In September 1841 he made his proof, and in December following he paid the promissory note, thus showing he was satisfied that *Williams & Co.* had a right to enforce the payment of the note. And it was not till January 1842, that the assignees got the other securities out of the hands of *Williams & Co.* There is a great difference between this case and others, where the securities were under the control of the bankrupt at the time of his bankruptcy.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I have thought of this case frequently since it was last before the Court, and am therefore able to give my judgment upon it at once; although I do not remember precisely a case of a similar kind. I dismiss from my consideration the circumstance of the petitioner having proved his debt under the fiat; inasmuch as he has received no dividend on his proof, has not interfered in the choice of assignees, nor in fact taken any other benefit from such

proof, which appears to have been made, under complete ignorance of the nature and extent of his rights. The petitioner had borrowed money from the bankrupts on his promissory note, payable on demand, with interest. This note the bankrupts deposited, and also various other notes and bills, with *Williams, Deacon & Co.*, the London bankers, as a security for advances made by them to the bankrupts. It is not suggested, that the petitioner had any knowledge whatever that the bankrupts had parted with his note; and it may be reasonably supposed that he regulated his dealings, as far as the bankrupts were concerned, on the understanding that it still remained in their possession. It appears that the bankrupts transferred the possession of the note, not absolutely, but by way of pledge, to *Williams, Deacon & Co.*, which gave them a right to deal with the note as against the petitioner. The petitioner, however, thinking that the bankrupts still held his note, takes the notes issued from their bank in the ordinary course of business, which he might not have done if he had known that they had parted with his own note. But, having ascertained this fact, he endeavours to establish a set-off against the London house when they call upon him to pay the amount of his note to them, as the holders of it. They decline to allow the set-off, and compel him to pay the full amount. It seems that the securities held by the London bankers were more than enough to satisfy all their claims against the bankrupts, and that the surplus of those securities have since come to the hands of the assignees. The question is, therefore, under these circumstances, whether the petitioner is barred from the right of set-off, which he would otherwise have had,


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against any demand of the bankrupts on his promissory note. In a certain sense, the property in the note had never left the bankrupts, as they had only parted with the possession of it, by way of pledge; and the question then would be, whether the case does not come strictly within the terms of the clause of mutual credit in the Bankrupt Act, 6 *Geo.* 4. c. 16. s. 50. But the case does not rest wholly upon that question. For, suppose the London bankers had retained the mass of securities put into their hands by the bankrupts, after receiving from the petitioner the amount of his promissory note, and had realized the whole of the other securities, paying themselves in full,—I should then have considered the dealings of the petitioner, in regard to the bankrupts' notes, in the same light as if the bankrupts had kept his promissory note, and that he would have a right against the London bankers for the surplus proceeds of those securities, to the extent of the sum paid by him on his promissory note, in preference to any other persons. I am of opinion, therefore, that the petitioner is, in substance, entitled to the relief he asks; reserving any inquiry which the assignees may wish to have, as to the time when the petitioner became possessed of the bankrupts' notes, with liberty to state special circumstances. I do not think it is a case for costs on either side, unless the respondents take an inquiry, in which event the costs will of course be reserved.





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Ex parte STEWARD.—In the matter of DODSHON BLAKE.

Westminster,  
Jan. 23.

THIS was the petition of one of the public officers of the East of England Bank, claiming on behalf of the bank a lien upon (among other property) certain trust funds in which the bankrupt was interested.

*A cestui que trust*, entitled to monies payable out of a fund in the hands of trustees, is indebted to his bankers in a large amount, by which his account is overdrawn, and in consideration of not being pressed to reduce this amount, he agrees to give the bankers a lien on the monies coming to him out of the trust fund. He thereupon addresses a note to one of the trustees, requesting and authorizing the trustee to pay to the credit of the account of the *cestui que trust* at the bank the monies payable to him out of the trust fund. The trustee is apprised of the arrangement between the parties. *Held*, on the *cestui que trust* becoming bankrupt, that the bank had a good lien, and that the authority given by the note was not countermandable.

By articles of agreement entered into in May 1840, on the dissolution of a partnership between the bankrupt and one *Robert Wiffen Blake*, who had carried on business at Norwich, as mohair yarn spinners, the latter agreed to take certain parts of the machinery and stock in trade at a valuation to be made by one *Joseph Redgrave* and one *Jasper Howes Tipple*, or an umpire to be chosen by them. The amount of the valuation was to be paid to *Redgrave* and *Tipple*, to whom all the outstanding credits of the concern were assigned, and all monies in the hands of the partners belonging to the firm were to be paid. *Redgrave* and *Tipple* were to open an account in their names with the East of England Bank, and to pay to this account all monies received by them on account of the valuation or otherwise immediately on the receipt thereof, which monies were to be continued in the bank until the application thereof as thereafter directed. After payment of the expenses incidental to the trust, the surplus was to be divided between the partners equally, after payment of a certain compensation to the bankrupt, the amount of which was to be settled by the trustees or their umpire.

An account was accordingly opened in the names of the trustees, and divers sums were paid by them into the bank to the credit of that account, but the sums to be settled by the arbitration of the trustees had not been determined.

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Some time before 7th April 1842, the bankrupt, who kept a private account of his own with the East of England Bank, and had deposited certain deeds to secure the balance, on which his account might from time to time be overdrawn, was indebted to the bank in a greater amount than that by which it had been agreed he was to be at liberty to overdraw. The manager of the bank saw the bankrupt on the 7th April, and insisted on his reducing his debt to the bank from 4365*l.* 5*s.* 9*d.*, its then actual amount, to 2700*l.*, whereupon the bankrupt requested that the bank would forbear to press him for an immediate reduction of his balance, and offered to give the bank a lien on his share of the money lying in the bank to the credit of *D. and R. W. Blake's* trust. On the manager agreeing not to press for an immediate reduction, the bankrupt addressed and sent to *Redgrave* the following note.

“ *Mr. J. Redgrave.*

“ Norwich, 8 April 1842.

“ My dear Sir.—I beg to authorize and request you to pay to the credit of my account with the East of England Bank, such sums as may be awarded to me from the account of *D. and R. W. Blake*, of which you are a trustee. Yours, very truly,

*D. Blake.”*

With this letter, there was transmitted to *Redgrave* a form of an undertaking for him to sign, written by the manager of the bank, by which undertaking *Redgrave* was requested to bind himself, upon the final settlement of the trust, to pay the balance due to the bankrupt to the credit of the bankrupt's private account at the bank. At the time, *Redgrave* was informed that the note signed by the bankrupt was intended as a security, and ex-

pressed his readiness to carry out the intention, but declined signing the undertaking, which was thereupon destroyed by the manager of the bank.

The fiat issued on the 30th April.

Mr. *Koe*, and Mr. *Dixon*, in support of the petition, cited *Row v. Dawson* (a), *Watson v. Duke of Wellington* (b), and *Ex parte Alderson* (c).

Mr. *Anderdon*, and Mr. *Bacon*, for the assignees.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The question here is whether any equitable assignment was made, for it is conceded that if made, it was sufficiently notified to those who had the control over the trust fund. The two *Blakes* having dissolved their partnership, it was arranged that the assets of the firm should be vested in two persons, named *Redgrave* and *Tipple*, who were to act as arbitrators and trustees. They were to discharge the partnership liabilities, to provide for the distinct rights of the partners, and to divide the surplus. The trustees were directed to open, and did open, an account in their own names with the East of England Bank, but as trustees for the purposes of the agreement entered into on the dissolution of the partnership, though whether this last circumstance appeared upon the books of the bank is not material. The bankrupt had a private account of his own with the bank, which was overdrawn, and he was heavily indebted to the bank. It appears that the agent of the bank expressed his dissatisfaction as to the amount by which this account was overdrawn, and by the affidavit of the agent it appears that this took place, namely,

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(a) 1 Ves. 331. (b) 1 Russ. & Myl. 602. (c) 1 Mad. 53.

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that the bankrupt requested the directors of the bank to forbear to press him for a reduction of the balance due from him, and offered to give the bank a lien on his share of the fund in which he was interested with his former partner—not saying for the amount by which his account was overdrawn, but only saying in consideration of not being pressed to reduce that amount. In consequence of this offer, the agent agreed on behalf of the bank not to press for such reduction. In substance, therefore, the bank accepted the security. Not only does this appear which I have stated, but it appears that a communication took place between the agent of the bank and Mr. *Redgrave* on the subject, with reference to the supposed materiality of Mr. *Redgrave's* signing an undertaking to abide by the arrangement. Such an undertaking, however, was not necessary to give validity to the transaction, it being admitted that Mr. *Redgrave* was aware of the intention of the parties. There is therefore here an order by a party with an equitable title to a fund, as a *cestui que trust*, to the trustee, given as a security, amounting in effect to a direction to pay to a creditor the portion belonging to the *cestui que trust*. And if these had been the express terms of the order to the trustee, no question could have arisen; but it is said the direction is to pay, not to the creditor, but to the credit of the bankrupt's account with the East of England Bank. When paid however to that account, the bank would have been entitled to set off against it the amount due to the bank from the bankrupt; the bank might have paid itself out of the money paid in, and I therefore think the order amounted to the same thing. It is however stated, that the order was afterwards countermanded, but the question is, was it countermandable or not? A power of

attorney may be given under such circumstances as not to be capable of being revoked, and my opinion is, that the intention of the parties was, that this authority should be irrevocable. I think therefore that this is, to all intents and purposes, a valid equitable assignment, and that it has been communicated to all the parties to whom communication was necessary.

The usual ORDER.

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Ex parte JOHN CARRUTHERS.—In the matter of JOHN CARRUTHERS.

*Westminster,
Court of Review,
January 11,
and coram
Lord Lynd-
hurst, C.
Jan. 12 and 19.*

MR. *Rogers* moved that the bankrupt's certificate might be allowed upon the affidavit of a friend of the bankrupt, and of the solicitor acting on the bankrupt's behalf, that the certificate was obtained fairly and without fraud, as the deponents verily believed, and had no reason to doubt. In support of the application, an affidavit of the bankrupt's friend, one Mr. *James Hore*, and of the solicitor was read, stating that the bankrupt had surrendered, and had passed his last examination on the 22nd of March 1841, and that the solicitor had acted as the bankrupt's solicitor throughout in the matter of the bankruptcy, and that the bankrupt had left England in June 1842 for the East Indies, to establish himself, and seek his livelihood there, and had, as deponents believed, already arrived, and was then at Calcutta. The certificate had been signed by the requisite proportion of creditors, and by the Commissioner.

An appeal from the refusal of a motion by the Court of Review should be by way of special case, and not by way of motion before the Lord Chancellor. Neither the Court of Review, nor the Lord Chancellor, has jurisdiction to allow a bankrupt's certificate, unless the bankrupt himself makes an affidavit of conformity.

The COURT declined making any Order, considering

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 Ex parte
 CARBUTHERS,

that the act required an affidavit of conformity from the bankrupt himself (a).

January 12.

Mr. Rogers, on this day, made the same motion before the Lord Chancellor, upon the same affidavit.

The LORD CHANCELLOR. The more convenient course will be to bring the matter before me in the form of a special case. That is the proper mode of appealing from a decision of the Court of Review.

Mr. Rogers submitted, that, as the present application had been made by way of motion, and not by way of petition to the Court of Review, a special case was not requisite. An appeal from the refusal of a motion by the Court below was a new motion (b).

The LORD CHANCELLOR. Does that rule apply in bankruptcy?

(a) 6 Geo. 4. c. 16. s. 122. "And be it enacted, that such certificate shall be signed by four-fifths in number and value of the creditors of the bankrupt, who shall have proved debts under the commission to the amount of 20*l.* or upwards, or after six calendar months from the last examination of the bankrupt, then either by three-fifths in number and value of such creditors, or by nine-tenths in number of such creditors, who shall thereby testify their consent to the said bankrupt's discharge as aforesaid; and no such certificate shall be such discharge, unless the Commissioners shall in writing under their hands and seals certify to the Lord Chancellor that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery, and also that the creditors have signed in manner hereby directed, and unless the bankrupt make oath in writing, that such certificate and consent was obtained without fraud, and unless such certificate shall, after such oath, be allowed by the Lord Chancellor, against which allowance any of the creditors of the bankrupt may be heard before the Lord Chancellor."

(b) See *Const v. Barr*, 2 Russ. 161; and *In the matter of Joseph and Webster*, 1 R. & M. 496.

Mr. Rogers. It is not prescribed by any Order or practice peculiar to Courts of Equity other than the Court of Review, but is founded upon reasons which are as applicable to that Court, as to the Court of Chancery.

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 CARRUTHERS.

The LORD CHANCELLOR however desired that the appeal might be brought on in the form of a special case; and the following case having been settled by the Court of Review, came on to be heard accordingly.

SPECIAL CASE.

“ The fiat in this case bears date the 21st day of September 1840, and was issued and is now in prosecution against the said *John Carruthers*, by the name and description of ‘ *John Carruthers*, of Mitchells, in the parish of Speldhurst, in the county of Kent, and last residing at Shepperton, in the county of Middlesex, lately also carrying on business as a distiller, in partnership with *Frederick Fraser Carruthers*, of Manchester, in the county of Lancaster, under the name of *Carruthers & Co.*, and the Manchester Distillery Company, dealer and chapman.’

January 19.

“ That the said *John Carruthers* was adjudged and declared bankrupt under the said fiat, and having surrendered himself to the said fiat, passed his examination on the 22d of March 1841.

“ That *William Patterson*, of Old Broad Street, in the city of London, acted and acts for the said *John Carruthers* as his solicitor in the matter of the said bankruptcy; and in the month of November 1842, *James Hore*, the intimate friend of and acting for and on behalf of the said *John Carruthers*, instructed the said *William Patterson* to apply on behalf of the said *John Carruthers*

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Ex parte
CARRUTHERS.

to the Commissioner acting in the prosecution of the said fiat, for the allowance of the certificate of the said *John Carruthers* thereunder, he the said *John Carruthers* being abroad as after mentioned, but having authorized the said *James Hore* to aid in obtaining the allowance of the said certificate. A public sitting for the allowance of the said certificate was held on the 18th day of December 1842, the required notice of such sitting having been duly advertized; and Sir *C. F. Williams*, the Commissioner acting in prosecution of the said fiat, duly allowed the said bankrupt's certificate at such meeting in the usual form, certifying the said bankrupt's conformity, and that the said *John Carruthers* was entitled to the allowance of his certificate, and to have such allowance and benefit and discharge as therein mentioned.

“ That the said *John Carruthers* had previously left England in the month of June 1842, in a ship bound for Calcutta, in the East Indies, to establish himself in that country, and was now on his passage to or arrived at that place.

“ That in the said month of June the said *James Hore* received from the said *James Carruthers* a power of attorney dated the 6th day of that month, executed by him, empowering the said *James Hore* to act for him in certain matters in this country, and witnessed by his son *Arthur St. John Carruthers*, describing himself ‘ Passenger on board the *Ripley*, bound to Calcutta, and now at sea.’

“ That on the 11th day of January 1843, Mr. *Rogers*, of counsel for the said bankrupt, moved and stated divers reasons before the Right Honourable Sir *James Lewis Knight Bruce*, Chief Judge of the Court of Bank-

ruptcy, that the said certificate should be confirmed by the Court of Review, under the circumstances before stated, proved by the affidavit (duly filed in support of such motion) of the said *William Patterson* and the said *James Hore*, and further deposing that such certificate was obtained fairly and without fraud, as the defendants verily believed and had no reason to doubt; but upon hearing the said motion, his Honour the said Chief Judge of the Court of Review was pleased to refuse such application, and did not think fit to make any Order thereon, but expressed his readiness to sign a special case, that your Lordship's decision upon the application might be obtained.

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 CARRUTHERS:

"The said *John Carruthers* is aggrieved, and humbly appeals to your Lordship.

"The question for the opinion of the Court is,

"Whether the Order, for which application was made, ought, under the circumstances, to have been made, without any affidavit by the bankrupt."

Mr. *Rogers* cited *Ex parte May* (a), and *Ex parte Waterhouse* (b), in both of which cases the personal affidavit of the bankrupt had been dispensed with, the Court considering that the clause in 6 *Geo. 4. c. 16. s. 122.*, which provides that no certificate shall be granted unless the bankrupt made oath that it had been obtained without fraud, would be substantially satisfied by any evidence which the Court could rely upon, in cases where the bankrupt's own oath could not be obtained. In the former of these cases, the bankrupt was a lunatic; in the latter he was, as in the present case, absent from this country, without any fault of his. It could not be

(a) 2 M. D. & D. 381.

(b) 2 M. D. & D. 760.

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the intention of the legislature to render it impossible to obtain a certificate under such circumstances. Such, however, would be the result of adhering to the mere letter of the clause, and not to its spirit.

The LORD CHANCELLOR thought that the words of the act were imperative, and allowed him no option in the case, and that the parties must bend rather than the statute.

Appeal dismissed.

*Lincoln's Inn,
Feb. 22 and 27,
and
March 27.*

The 24th section of the 5 & 6 Vict. c. 122, which declares that the Gazette containing the advertisement of the bankruptcy shall be conclusive evidence in all cases against the bankrupt, unless he shall within a certain time have commenced an action, suit, or other proceeding, to dispute or annul the fiat, applies only to actions at law and suits in equity, and not to petitions in the Court of Review. But see the next case.

Ex parte BENJAMIN HART THOROLD.—In the matter of
BENJAMIN HART THOROLD.—

THIS was a petition of the bankrupt to annul the fiat, on the ground that he was not a trader.

The affidavits in support of the fiat alleged that the bankrupt traded as a dealer in wool, a brewer, a maltster, a stage-coach proprietor, a brickmaker, and a coal merchant.

In answer to these allegations, the bankrupt swore that he occupied and lived upon a farm, in which he had a reversionary interest, and that he occasionally bought wool for the mere purpose of mixing it with the wool grown upon his farm, and rendering it more saleable. He denied that he was a brewer, or that he ever sold any beer. He also denied that he ever was a proprietor, or part proprietor, of any stage-coaches, but that he merely provided horses to work two stages, not for profit, but for his own accommodation and that of the public, and in order to induce other persons to work that line of road—

that it was a losing speculation on his part—and that it was wholly to cease when it became profitable, with a view that other persons might horse the coaches. With respect to the alleged brickmaking, he stated that he only made bricks and tiles for the purpose of draining the land on his farm, and not for the purpose of sale, that he used a brick-yard for this purpose for only one year, and that he afterwards let it to another person, who carried on the business for his own profit and on his own account, and that all the sales of bricks were made by that person alone. He denied that he ever dealt in coals, or ever bought any, except for his own use, and the purposes of his farm. And as to the trade of a maltster, he admitted that he hired a malt-kiln for making his own barley into malt; but this he stated was for his own consumption, and he took out no licence.

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 Ex parte
 THOROLD.

The petition was not presented until after the expiration of twenty-one days after the advertisement of the bankruptcy in the Gazette; and the first question raised was, whether the Court could entertain it, under the provisions of the 5 & 6 *Vict. c. 122. s. 24.*

Mr. *Swanston*, and Mr. *Terrell*, in support of the petition. By the 24th section of the new act (a), the Gazette is made conclusive evidence in all cases as against the bankrupt, unless he (if within the kingdom at the date of the adjudication) has commenced an action, suit, or other proceeding to dispute or annul the fiat, within twenty-one days after the appearance of the advertisement in the Gazette. The question is, whether the words “in all cases” are to be taken in the full latitude of which

February 22.

(a) 5 & 6 *Vict. c. 122.* See Appendix, page x.

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they are capable, or whether they do not mean all those cases, only, in which the bankruptcy is collaterally in issue, so as to leave this Court in the possession of the jurisdiction which it has always possessed, of annulling at any period its own process. If the words are to be taken literally, they would include the case of a fraudulent fiat; which, upon that construction of the act, this Court would have no power to annul at the instance of the bankrupt, if, from the fraud remaining so long undiscovered, or any other reason, twenty-one days elapsed before a petition was presented. Such cannot be the true construction of the section. It was introduced for the purpose of extending and giving effect to the 92nd section of 6 *Geo. 4. c. 16.*, which provided that if the bankrupt should not (if he were within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he were out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the Commissioners at the time of or previous to the adjudication of the petitioning creditor's debt, and of the trading, and act or acts of bankruptcy, should be conclusive evidence of the matters therein respectively contained, in all actions at law, or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit. The object of the new enactment was, to make the Gazette evidence instead of the proceedings, and to extend the provisions to the bankrupt, but not to extend them to proceedings in this Court to annul the fiat,—as is evident

from considering that whatever may be the construction of the act as to the bankrupt, it is clear that any one else may present a petition to annul, although the twenty-one days are over; and, that it could not be the intention of the legislature to introduce such an anomaly. [The *Chief Judge*. If the bankrupt brought an action against the assignees after the twenty-one days, would not the clause be an answer to the action?] We submit it would not, looking at what must have been the intention of the legislature, viz. merely to make the advertisement conclusive in cases where the question of bankruptcy arose incidentally. [The *Chief Judge*. Then what is the meaning of "in all cases as against the bankrupt"?] Those words may have a sufficient meaning given to them, if they should be construed as making the proceedings by the assignees, in any action in which the bankruptcy was incidentally a question, conclusive as against the bankrupt, even where he afterwards succeeded in overthrowing the fiat, and such, we submit, must be the only effect which the expression was intended to have.

There are two classes of proceedings in which the validity of the fiat may be in issue; one, where the assignees are proceeding in right of the bankrupt; the other, where the assignees and the bankrupt are contesting the validity between themselves. We submit, that the first class is the only one contemplated by this section. For the second class some provision was attempted to be made by the 1 & 2 Will. 4. c. 56. s. 17 (a).

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THOROLD.

(a) By 1 & 2 Will. 4. c. 56. s. 17. "if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the said Court of Review, such petition to be presented within two calendar months from the date of such adjudication, if

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An appropriate mode of proceeding under this clause was provided in the Court of Review, according to which the bankrupt was permitted to have copies of the proceedings, a privilege which he had not, upon a petition to annul. The circumstance, however, of the result of an application under this clause being final, and precluding the bankrupt from ever again questioning the validity of the fiat, has been considered so disadvantageous, that the clause has gone out of use, and is never acted upon. It was held by the Court of Review, and also by the Lord Chancellor, as not restrictive of the right of the bankrupt to petition to have the fiat annulled, but as a supplemental and additional remedy; nor was the

such trader shall be then residing within the United Kingdom, or within three calendar months from the date aforesaid, if then residing in any other part of Europe, or within one year from the date aforesaid, if then residing elsewhere, or within such other time as the said Court shall allow (not exceeding one year, to be computed from the date aforesaid), such Court of Review shall proceed to hear and decide on the said petition, or at the option of the said bankrupt, and on his finding such security for costs (if the said Court shall think fit to require any security) as by the said Court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication by a jury, to be duly impanelled and sworn for that purpose before the Chief Judge, or any one or more of the other judges of the Court of Bankruptcy; and if the verdict on such issue shall not be set aside, on application made to the said Court of Review, within one month after the said trial, or if the adjudication of the Commissioners shall not be set aside by the said Court of Review on the petition aforesaid, such verdict, or such adjudication of the said Commissioner, shall in all cases, as against the said bankrupt, and also as against the petitioning creditor, and against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was, or was not, a bankrupt at the date of such adjudication, any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: provided always, that an appeal shall be to the Lord Chancellor from the decision of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only."

very short period limited by the clause overlooked in the construction of the statute, with reference to the question, whether it was intended to deprive the bankrupt of his right to seek to have the fiat annulled, after two months had elapsed? [The *Chief Judge*. Is that provision repealed by the new act?] We submit that it is not, and that there is no repugnance between the two enactments. The new act, we submit, neither destroys the 1 & 2 Will. 4. c. 56. s. 17., nor the general practice of presenting a petition to annul. Another reason why it cannot be proper to construe the words literally, is, that, so construed, they would be productive of the greatest hardship, such as it can never have been the intention of the legislature to introduce. Up to the adjudication, the proceedings are still *ex parte*, as they were under the old acts; the bankrupt knows nothing of them. Under the new act, notice of the adjudication is served upon him, and he has five days to dispute it before the advertisement is published; but the service need not be personal; the notice may be left at his usual place of abode, or place of business; he may never hear of it; and yet, if he happen to be within the kingdom at the time of the adjudication, he will, in twenty-six days from that time, during all which period he may know nothing of the proceedings, be irrevocably a bankrupt. [The *Chief Judge*. He might be at the extremity of the Shetland Isles in the depth of winter; or he might, at the moment of the adjudication, be at an outport, on the point of embarkation, and might not return to this country, or hear of the adjudication, till long after the period has elapsed during which alone it would, according to the literal construction of the clause, be competent to him to dispute the fiat,—and this, without the slightest fault or

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even negligence or inattention on his part; but still he might be bound, for he would then have been in the United Kingdom at the date of the adjudication.] These considerations are sufficient to show that such cannot be the meaning of the clause. [The *Chief Judge*. The very frame of the clause seems to indicate that it does not apply to this Court. The provision, that the Gazette shall be conclusive evidence, seems hardly to apply to the Court from which the advertisement in the Gazette proceeds, and which is never in the habit of referring to the Gazette as evidence.]

Mr. *Anderdon*, for the petitioning creditor. The words of the section are express and unambiguous. To put upon them the construction contended for by the other side, would be to repeal the act. The provisions of former enactments cannot decide the case; for a very different state of things is produced by the new statute. Under the old law, the bankrupt had no opportunity of disputing the adjudication, before the advertisement issued; and it might be right, therefore, to allow him a longer time to dispute the correctness of that decision, against which he had no opportunity of being heard in the first instance. But the bankrupt now has notice of the adjudication, and time given him to be heard against it, before it is published to the world. Under these altered circumstances, it seems quite justifiable to contract the period, during which he may disturb all that has been done, while he lay by without opposing the fiat. And although in this, as in other matters, extreme cases may be imagined, under unusual and improbable combinations of circumstances, in which the act might operate with some appearance of rigour, the general frame of a law cannot

be adapted with reference to rare, unlikely, and extraordinary contingencies, but must be adapted to the ordinary purposes of mankind; and such, it is conceived, are fully provided for by the clause as it stands; and if they are not, its provisions can only be relaxed by the legislature.

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Mr. *Swanston*, in reply.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I shall decline giving a partial judgment in this case, involving, as it does, both a question of law and fact. There are some facts, also, which are imperfectly alleged in the petition, and which do not appear in any of the affidavits, I should therefore wish the case to be completed, by filing affidavits as to those facts. The prayer of the petition should be to *annul the fiat*, and not to *annul the adjudication*. Let the petition therefore be amended accordingly, and stand over for further hearing on the 27th of March.

The case came on again for hearing this day.

March 27.

Mr. *Swanston*, in support of the petition, objected to the deposition before the Commissioner, as to the trading, being read in evidence against the bankrupt, although a copy of it had been furnished, and notice given that it would be read. In *Ex parte Chambers (a)*, before the Lords Commissioners, it was decided that the examination of a third party, taken behind the back of the petitioner, cannot be read in evidence against him, although the Court for its own satisfaction has a right to look at it; and upon that occasion, Lord Chief Commissioner

(a) 1 Deac. 197.

1843.

Ex parte
THOROLD.

Pepys said, "You cannot make that evidence, which is not evidence, by offering the other side a copy of the document proposed to be read." This decision was also acted upon by this Court in *Ex parte Thurkell* (a).

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I doubt whether the deposition is not admissible in evidence. In answer to the objection that it is made behind the back of the bankrupt, it may be remarked, so are all affidavits; and this Court proceeds on affidavit. But whether receivable, or not, in evidence, is the objection worth a feather? The distinction is quite impalpable, between the reception of a document in evidence, and the inspection of it by the Court. If the Court can look at the deposition, knowing well in what manner it is made, and having power to direct further inquiry as to the subject-matter of it, it really seems to me of no importance to raise such an objection. But I give no opinion on the subject, at present, either one way or the other.

Mr. *Swanston* then commented on the evidence in contradiction to the alleged trading, and recapitulated his former argument as to the construction of the 24th section of the 5 & 6 *Vict.* c. 122, contending that it only applied to actions at law and suits in equity, and was never intended to bind the discretion of this Court in annulling a fiat improperly issued. But, even if the Court should think that it was absolutely bound by the words of this section, then we contend, that the notice of the bankrupt's intention to dispute the fiat, being given before the expiration of the twenty-one days, was a *proceeding*, within the true intent and meaning of the enactment.

Mr. Anderdon, *contra*.

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THOROLD.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I am not satisfied, that the bankrupt was not a trader, as a stage-coach proprietor, and a dealer in coals; and if this case had been brought before me previous to the 5 & 6 Vict. c. 122. I should have thought it a very proper matter for an action or an issue, or a *viva voce* examination. As this, however, would involve considerable expence, the respondents are entitled to have the opinion of the Court on the preliminary objection. The question is, whether, under the 24th section of the 5 & 6 Vict. c. 122, the discretion of this Court to entertain the bankrupt's application to annul the fiat is absolutely barred; and, on the disposal of this point, the respondents would probably require time to take the matter before the Lord Chancellor. I have certainly an impression, that so much mischief would accrue from holding that this Court was precluded by the 24th section from exercising a discretion as to directing any further inquiry on this petition, that I should prefer the matter going at once to the Lord Chancellor, on the opinion I entertain that this Court is not so precluded; and that, although the omission of the bankrupt to take any proceeding to dispute or annul the fiat would be a conclusive bar to an action at law, it is a mere ingredient in the case of an application to the equitable jurisdiction of this Court, and one on which the Court has a right to exercise its discretion. There is also another question in the present case, and that is, whether a notice of the bankrupt's intention to dispute the fiat, though unaccompanied by any proceedings within twenty-one days, during the whole of which he lay in Nottingham gaol,

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Ex parte
THOROLD.

has not reserved for him a right to take subsequent steps for that purpose. The decision of both these points is attended with considerable difficulty; but, in a choice of difficulties, the only thing I now decide is, that this Court is not absolutely bound by the 24th section. The words of that section are, I think, reasonably susceptible of the construction I put upon them, in overruling the objection; a contrary construction, I conceive, ought not to be come to, without serious consideration. Being thus of opinion that the 24th section does not preclude this Court from annulling the fiat for want of the legal requisites, and that the case itself calls for further inquiry, the matter may now go for the decision of the Lord Chancellor; for the question is too important to be settled, without due consideration by the highest authority. Taking the entire contents of the 24th section, and looking also at the contents of the 2nd, 23rd, 26th, and 93rd sections,—considering the whole act generally, and feeling a strong disinclination to construe the 24th section so as to fetter the discretionary jurisdiction of this Court,—I think that the words “in all cases,” contained in the 24th section, apply merely to actions at law and suits in equity, and not to petitions to the Court of Review. The proceeding before the Lord Chancellor must be, of course, by appeal on a special case, which the parties will arrange by conferring with each other; and I shall hold myself ready at any time or place to receive the necessary application on the subject, so as to facilitate an early determination of the point by the Lord Chancellor.



1843.

Ex parte THOROLD.—In the matter of THOROLD.

*Lincoln's Inn,
coram Lord
Chancellor,
29 July,
2 August, and
16 October.*

THIS was an appeal by the assignees in the above bankruptcy, from the decision of the Court of Review in the last case. The facts, as they relate to the point of law, came before the Lord Chancellor on the following,

A petition to the Court of Review is comprehended with in the words "other proceeding," contained in the

SPECIAL CASE.

The fiat issued on the 12th December 1842, and the adjudication was made on the 22nd of December, the bankrupt being at the time within the United Kingdom. On the 24th December, the bankrupt, being confined in the gaol of the town of Nottingham for debt, was served personally by a clerk of Mr. *Joseph Moore* of Lincoln, the solicitor to the fiat, with a duplicate of the said adjudication, and at the time of such service informed the said clerk that he never had been a trader, and that he should dispute the fiat in every way. On the 25th December 1842, being the first post after he had received the notice, the bankrupt sent a letter to the Commissioner, stating, that he never had been a trader, or bought or sold for the purpose of making a living, but that he was a country gentleman occupying his own property at Harmston, and that the proceeding was a conspiracy, and respectfully requesting the Commissioner to inform the said *Benjamin Hart Thorold* what steps he should take to annul the fiat.

24th section of the 5 & 6 Vict. c. 122. Therefore, where a petition of the bankrupts to annul the fiat is not presented until after the expiration of 21 days after the advertisement of the bankruptcy in the Gazette, the Court of Review has no authority to entertain it.

The commencement of the proceeding by petition, within the meaning of the above section, is the presentation of the petition, and not the mere preparation of it by the solicitor, or a notice by the bankrupt to the Commissioner disputing the validity of the fiat.

In reply to this letter, the bankrupt received from Mr. *Pennell*, the official assignee, the following letter:

"Basinghall Street, 27 December 1842.

Sir.—Mr. Commissioner *Fonblanque* has handed me your letter to him of the 25th instant on the subject of

1843.

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THOROLD.

the fiat of bankruptcy which has been issued against you. If it be your intention to show cause against the adjudication, you ought to lose no time in putting the matter into the hands of your legal adviser; for if you were served with notice as you state on the 24th, the hearing will come on on the 29th, being the day after to to-morrow—I am Sir, your obedient servant,

W. Pennell."

This letter reached the bankrupt on the 28th day of December at Nottingham, (the following day being the day for showing cause against the adjudication in London). Being a prisoner, the petitioner did not attend in person to show cause, and he now insisted that he could not do so, and had not time to instruct his attorney, or procure the attendance of the witnesses within the time allowed for that purpose. Notice of the said adjudication was published and given in the London Gazette of Friday the 30th of December. On the 28th of December the petitioner sent a letter to Mr. *Charles Eike*, of Park Street, Westminster, his solicitor, enclosing Mr. *Pennell's* letter, and urging him to resist the fiat in the first instance, as the said *Benjamin Hart Thorold* did not wish to appear in the Gazette; but if that could not be done, then to commence an action against the petitioning creditor, or other proceedings for annulling the said fiat. On the 18th of January the petitioner received a letter from Mr. *Eike* by post at Nottingham, stating that he had by the previous day's post enclosed the petition to annul the fiat to a solicitor at Nottingham, who would wait upon the petitioner, and attest the said *Benjamin Hart Thorold's* signature in pursuance of the instructions of the petitioner. Mr. *Eike* drew a petition to annul the fiat, and on the 12th January 1843, laid the

same before counsel for settlement; and on the 16th January 1843, he procured the same from counsel, settled and approved by him, and on the same day caused the same to be engrossed, and on the following day he forwarded the same in a letter directed to Mr. *Samuel Payne*, solicitor, Nottingham, with instructions to get the same signed by the said *Benjamin Hart Thorold*, and duly attested, and saying that the same petition should be returned by return of post.

On the 21st of January 1843, Mr. *Eike* received the following letter from Mr. *Abraham Cam*, a solicitor at Nottingham.

“ Nottingham, 21 January 1843.

Sir.—Owing to the enclosed petition having been directed to Mr. *Payne*, I forwarded it to him at Leeds, he having been recently appointed one of the deputy registrars of the Court of Bankruptcy, and I only received it from him this morning, which will account for the delay. I have this morning seen Mr. *Thorold*, and he has altered his petition as you will perceive, and he has made a pencil marginal observation. As soon as you have altered it to suit the facts, I will again wait on Mr. *Thorold*.—I remain, &c.

Abraham Cam.”

The petition referred to in the last mentioned letter was the petition before mentioned, as sent by Mr. *Eike* to Mr. *Payne*, having for its object the annulling of the fiat. On the 22nd January 1843, Mr. *Eike* having amended the petition, by post of that day returned the same to Mr. *Cam*, to be signed by the petitioner, and requesting that the petition might be returned as expeditiously as possible.

1843.

Ex parte
THOROLD.

1843.

Ex parte
THOROLD.

On the 25th January, Mr *Eike* received the following letter from Mr. *Cam*.

" Nottingham, 24th January 1842.

Dear Sir.—I have seen Mr. *Thorold* this morning, and as he will be in London by to-morrow under an order from Commissioner *Fonblanque*, and as he wishes to see you, he will sign it in your presence.—Dear Sir, &c.

Abraham Cam."

A warrant having been issued by the Commissioner to have the petitioner brought before him on the 25th day of January, at the Court of Bankruptcy, Basinghall Street, the petitioner brought the petition up with him to London, and the same was on the 25th day of January signed by him, and lodged with the registrar of the Court the following day; but the petitioner did not within twenty-one days after the advertisement of the bankruptcy in the London Gazette commence any action or suit, or any other proceeding than is before stated, to dispute and annul the said fiat. On the 25th January 1842, the bankrupt surrendered himself before the said Commissioner acting in the prosecution of the said fiat, but his final examination was adjourned. The petitioner presented his petition on the 26th day of January 1843, to the Court of Review, (being the aforesaid petition), alleging that he had never been a trader within the intent and meaning of any statutes in force at the date of the said fiat, and praying, that the adjudication under the fiat might be annulled at the costs of *Joseph Dalney*, the petitioning creditor, and that the said petitioner might be allowed to have copies of the depositions filed with the proceedings in support of the said fiat. The petition, after having been in part heard, was, by leave of the Court of Review given on

the 27th day of February, amended by striking out the words "adjudication under the" from the prayer; whereby the said petition became a petition to annul the fiat.

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Ex parte
THOROLD.

Mr. *Anderdon*, and Mr. *Dixon*, for the appellants. The statements in the special case respecting the steps taken by the bankrupt to present a petition to the Court of Review were not brought forward in the Court below, and ought not to have been introduced into the special case. They are however wholly immaterial, as none of the steps alleged to have been taken can be, in any manner, considered the commencement of a proceeding to dispute or annul the fiat. Then, as to the principal question, the words of the 24th section are free from all possible ambiguity, and it is in fact repealing the statute to say, that the advertisement is not conclusive evidence of the respondent having become bankrupt. [The *Lord Chancellor*. But there is no provision in the statute which would prevent a creditor from petitioning to annul the fiat, after the twenty-one days have expired. Suppose the fiat were annulled upon such a petition, would the advertisement be conclusive evidence of the bankruptcy, after the fiat had been annulled?] Probably a judge would, in the exercise of his discretion, upon a petition to annul at the suit of a creditor, have regard to that consequence, and would decide with reference to the provisions of the act with respect to proceedings by the bankrupt. But with regard to the latter, the statute is express, and no imperfection in the other parts of the act, supposing it to exist, can neutralize the positive enactment of this section. [The *Lord Chancellor*. Do you maintain that the section applies to cases of fraud, or when fiats are sued out for improper purposes?] It

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THOROLD.

is not necessary to carry the argument so far. The act only provides that the advertisement shall be conclusive evidence, as against the bankrupt, that he became a bankrupt before the date and suing forth of the fiat. But although a man may have become a bankrupt, it may be inequitable, or it may be fraudulent, that a fiat should be sued out against him, under particular circumstances, by a particular creditor or for an improper object. In such cases we conceive the bankrupt might still present a petition to annul, although the twenty-one days had elapsed. It is the existence of a *status* of bankruptcy only, which the statute prevents him from disputing. He cannot petition to annul for want of the legal requisites, but he may impeach the fiat on any other grounds. The opportunity given by the 23rd section to the bankrupt, of disputing the requisites before the advertisement is published, accounts for and justifies the provisions of the 24th.

Mr. *Swanston*, and Mr. *Terrell*, for the respondent. The additional facts set forth in the special case were introduced for the purpose of raising the question, whether they did not amount to a commencement of a proceeding to annul the fiat,—that is, at all events, to such a commencement as could be made by a person so situated as this bankrupt was; and whether the Court would hold that, under the circumstances, he can be considered to have been guilty of any remissness in taking steps to impeach the fiat. They were introduced, too, for the purpose of showing the exact position of the bankrupt, in order that it might be considered, whether the act could have been intended to apply to such a case. As to the 23d section, the advantage which it affords to the

bankrupt, of disputing the requisites before the Commissioner, before the publication of the advertisement, would be a very insufficient compensation for the enormous hardship to which he is subjected, if the 24th section is to receive the construction for which the appellants contend. The terms of the 23d section only allow the bankrupt five days to discover the residence of the petitioning creditor, or of his solicitor, to instruct his own solicitor, and to be ready to meet the case made against him. But by the 13th of the new Orders (a), the bankrupt must serve notice upon the petitioning creditor, or his solicitor, and the deputy registrar of the Court, two days at the least before the day of showing cause against the adjudication. So that this small space of five days is reduced to three. It is impossible that the legislature should have intended this provision, as sufficient to counterbalance the injustice, which the Chief Judge, in the course of the argument in the Court below, showed would be the result of construing the 24th section literally. It cannot be consistent with justice, that an individual should be precluded from disputing a decision made against him *ex parte*, at the earliest moment at which he becomes acquainted with it. It would be a state of things hitherto unknown to our law. The true construction of the section must be to take "in all cases" in connection with what follows. The next words are, "and in all actions at law and suits in equity brought *by* the assignees," &c. Now, if "in all cases" be held to mean in all actions and suits, whether brought *by* the bankrupt, or not, a meaning is given to the more extensive expression, without producing any of the injustice and anomaly which would arise under any other construction. [The Lord Chancellor. The words

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Ex parte
THOROLD.

(a) See Appendix, lvii.

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 THOROLD.

"in all cases" might be intended to go beyond actions and suits, and to include indictments, which, as regards the bankrupt, it might be proper to include. But the question is, whether you can confine the clause to proceedings, whether civil or criminal, of which the fiat is the foundation, and exclude from its operation those proceedings, in which the existence of the fiat itself is the subject of consideration.]

Mr. *Anderdon*, in reply.

October 16.

The LORD CHANCELLOR this day caused a copy of the following judgment to be delivered to the solicitors for the appellants :

By the 23d section of 5 & 6 *Vict. c. 122.*, the bankrupt is allowed five days, after being served with a duplicate of the adjudication, to show cause against its validity. If he omits to do so, notice of the adjudication is to be published in the London Gazette. Still, however, he is not precluded from disputing the fiat. But he must do this within a certain limited time. For, by the 24th section, if he shall not within twenty-one days after the advertisement of the bankruptcy in the Gazette, have commenced an action, suit, or other proceeding, to dispute or annul the fiat, the Gazette containing such advertisement shall be conclusive evidence in all cases, as against the bankrupt, and in all actions at law and suits in equity brought by the assignees suing in respect of the bankrupt's estate, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat. A petition to the Court of Review to annul the fiat, is, I think, obviously comprehended within the words "other proceeding" in this section.

But the proceeding, as well as the action or suit, must be commenced within twenty-one days. The rule is, I think, imperative. It may be too rigid; but the Court has, I conceive, no authority to relax it. If it should be found inconvenient, or productive of hardship, the legislature must apply the remedy. The question, therefore, in this case is, whether the proceeding was commenced within the time limited by the act; and I think it was not. The commencement of the action, or suit, is the suing out of the writ; and the commencement of the proceeding by petition is, I conceive, the presenting of the petition. Neither the conversation with the clerk of the solicitor to the fiat, nor the notice to the Commissioner, nor the mere preparation of the petition, can, I think, be considered as the commencement of the proceeding, within the meaning of this section. It must be an act analogous to the commencement of an action or suit. Accordingly, in the 17th section of the previous act, 1 & 2 Will. 4. c. 56., which is *in pari materia*, the time for disputing the adjudication runs from the presenting the petition to the Court of Review. "If any trader, adjudged bankrupt, shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the Court of Review, (such petition to be presented within two calendar months from the date of such adjudication,) such Court of Review shall proceed to hear and decide on the said petition." I refer to this act merely for the purpose of illustrating and confirming my opinion, as to what, in the case of a *petition*, is to be considered the commencement of the proceeding. As to the effect of the clause in other respects, it may be observed, that it has not the strong negative words contained in the 24th section of the new

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Ex parte
THOROLD.

1843.

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THOROLD.

act. If I am right in my construction of the statute, it seems superfluous to consider the reasons assigned to excuse the delay in presenting the petition. But I cannot avoid observing, that the instructions to dispute the fiat were sent to the solicitor as early as the 28th of December; and it does not appear why the petition was not ready for the bankrupt's signature before the 18th of January. A little more activity in this respect might have rendered the circumstances of Mr. *Payne's* absence altogether immaterial. I think the Order cannot be supported.

Lincoln's Inn,
March 8.

A petition to substitute a new petitioning creditor's debt must be served upon the petitioning creditor, although his debt has been expunged, and although the petition does not pray costs against him.

Ex parte WARD.—In the matter of CLAPHAM.

THIS was the ordinary petition of a creditor, praying that his debt might be substituted for that of the petitioning creditor; but it did not pray that the latter might pay the costs of the application. The proof of the original petitioning creditor's debt had been expunged. The assignees consented to the application; but, on the Order being taken to the office, and it appearing that the petitioning creditor had not been served with the petition, the Registrar thought the Order could not be drawn up, without the attention of the Court having been expressly called to that circumstance.

Mr. *Russell* asked that the Order might be drawn up, and submitted, that, as costs were not asked against the petitioning creditor, it was not necessary to serve him, as he could not object to the Order sought, the proof of his debt having been expunged.

The COURT declined making the Order, unless the petitioning creditor consented, or a precedent were produced, showing that such an Order might be made in his absence.

1843.

Ex parte
WARD.

The Order was subsequently drawn up, the consent of the petitioning creditor having been obtained.

Ex parte NICHOLSON.—In the matter of NICHOLSON.

Lincoln's Inn,
March 20.

THIS was the petition of the bankrupt to have the fiat annulled. The fiat issued on the 23d of February; the adjudication took place on the 27th, and notice of it, according to the new act, 5 & 6 Vict. c. 122. s. 23 (a), was served upon the bankrupt. Upon his attending and disputing the existence of the requisites before the Commissioner, according to the provisions of that section, the adjudication was annulled. The petitioning creditor then adduced fresh evidence before the Commissioner, for the purpose of procuring a new adjudication; but the Commissioner declined to adjudicate *de novo*, and on the 11th of March the present petition was presented.

The fiat issued on February 23. Adjudication took place on the 27th, but was afterwards annulled. Further evidence in support of the bankruptcy was adduced before the Commissioner, who declined adjudicating *de novo* upon the evidence. At the end of fourteen days from the issuing of the fiat, the bankrupt presented a petition to annul the fiat. Held, that the fiat ought to be annulled.

Mr. *Anderdon*, in support of the petition. The adjudication being annulled, the matter is in the same state as if there had been no adjudication; and, as more than fourteen days have elapsed from the issuing of the fiat without any adjudication having been made, the fiat is supersedable for want of prosecution, under Lord *Rosslyn's* Order. There is no appeal from the decision of a Commissioner against the bankruptcy; *Ex*

(a) See Appendix, p. viii.

1843.

Ex parte
NICHOLSON.

parte Nicholls (a); Ex parte Johnston (b); Ex parte Jones (c).

Mr. *Russell*, for the petitioning creditor. So long as the fiat subsists, the petitioning creditor may tender evidence to satisfy the Commissioner that he ought to adjudicate. We have in our favour the decision of the Commissioner, who originally adjudicated and found the bankruptcy proved. [The learned counsel read the depositions on which the adjudication was made.] Under Lord *Loughborough's* Order, the Court would not supersede, if any reason to the contrary were shown. That Order only applies to cases, in which no attempt has been made to open the fiat. Here no want of diligence is or can be imputed to the petitioning creditor. [The *Chief Judge*. The difficulty is, that a petitioning creditor is without remedy, if the Commissioner refuses to adjudicate; there is no appeal.] In *Ex parte Stead (d)*, where the Commissioners would not adjudicate, Lord *Eldon* ordered that the petitioning creditor should be at liberty to take out another commission on the same docket papers, directed to other Commissioners; and those Commissioners being equally divided in opinion, Lord *Eldon* ordered the second commission to be superseded, and that a new commission should issue directed to the next list in rotation. Besides, the act constituting a Court of Bankruptcy has changed the practice. The Commissioners now constitute a branch of the Court, and this Court is constituted for the purpose of reviewing all their decisions. The reversal of one adjudication leaves the fiat still capable of being supported by another, and the

(a) 2 G. & J. 266.

(b) 2 M. & A. 390.

(c) 3 M. & A. 503.

(d) 1 G. & J. 301.

petitioner was actually engaged in adducing evidence in support of it when this petition was presented. The Commissioner who annulled the adjudication did so on the ground that the day on which the act of bankruptcy was committed did not appear. That defect has been since supplied. On the 7th and 9th of March several witnesses were examined before the Commissioner. [The *Chief Judge*. Did the Commissioner receive evidence after he had annulled the adjudication?] Yes; and that fact is a sufficient answer to this application.

1843.

Ex parte
NICHOLSON.

Mr. *Anderdon*, in reply.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Considering the nature and extent of that which alone had been done before March 10th, and considering the nature and character of that part of the evidence before me, which is clearly receivable, I am of opinion, in the exercise of my discretion, that this fiat ought to be annulled, and I annul it accordingly. But I think it equally proper, that it should be annulled, without prejudice to the petitioning creditor being at liberty to strike another docket, if he shall be so advised.

ORDERED accordingly; costs reserved, with liberty to apply.

Ex parte RODGERS.—In the matter of GREGORY.

THIS was the petition of the public officer of the Sheffield Banking Company, praying for the usual Order in

deposit with written memorandum, where the memorandum has been lost.

Lincoln's Inn,
March 20,
and
Westminster,
May 8.

Form of Order
on the petition
of an equitable
mortgagee, by

1848.
Ex parte
RODGERS.

the case of an equitable mortgage by deposit. It was stated, that the deposit had been accompanied by a written memorandum. It could not, however, be found; and the question was, how the costs were to be dealt with under such circumstances.

Mr. *Bacon*, for the petitioner.

Mr. *Dixon*, for the assignees, said, they could not admit the existence of the memorandum; they knew nothing of the matter.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Let it be referred to the Commissioner to inquire and state what deeds were deposited, and what property they related to, and for what purpose such deposit was made, and whether any and what memorandum of deposit was signed by the bankrupt.

May 8. On the case coming on again, on further directions, upon the Commissioner's report, it appeared that there had been a written memorandum, which was lost.

Mr. *Bacon*, in support of the petition, cited *Ex parte The Vauxhall Bridge Company* (a), where parol evidence was necessary, in addition to the memorandum; and that circumstance was held to make no difference as to costs.

Mr. *Dixon*, *contra*, cited *Ex parte Brightens* (b), and contended, that the lost memorandum could not be regarded by the Court for any purpose, as there was no

(a) 1 G. & J. 101.

(b) 1 Swanst. 3.

evidence whatever of its having been stamped; *Rippiner*
v. *Wright* (a).

1843.

Ex parte
RODGERS.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—My decision does not turn on the case of *The Vauxhall Bridge Company*. The general rule in bankruptcy, as to the costs of a petition presented by an equitable mortgagee by deposit, with a written memorandum, does not extend to a case, in which the memorandum has been lost. And I do not believe that Lord *Eldon* would have so extended it. If I had found any authority on the point, I should have considered myself bound to follow the practice as I found it; but, upon general principles, I think, that when a man by negligence, using the word respectfully, or by misfortune, has occasioned expense to another, that expense ought not to fall upon the other. Let the petitioner have costs as in the case of a written memorandum, except so far as the costs hitherto incurred are increased by the loss of the memorandum; which portion of the costs must follow the rule, where there is no written memorandum.

The ORDER as to costs was as follows :

And it is ORDERED, that the monies to arise from such sale be applied, in the first place, in payment of the expenses attending such sale, and of the proceedings incident thereto, and (subject as hereinafter mentioned) the costs of the said petitioner and assignees, of and occasioned by this application, such expenses and costs to be settled by the Commissioner, if the parties differ about

(a) 2 B. & Ald. 478.

1843.

Ex parte
RODGERS.

the same ; and then in payment to the said petitioner of what shall be so found due to him as aforesaid ; and that the surplus of the said proceeds (if any) be paid over to the assignees ; but if the monies arising from such sale (subject as aforesaid) shall not be sufficient to pay the petitioner the amount of what shall be so found due to him as aforesaid, then it is further ordered, that the said petitioner be at liberty to go in under the said fiat, and prove for the deficiency, and be admitted creditor thereunder for what he shall so prove, and be paid a dividend or dividends thereon, rateably and in equal proportions with the rest of the creditors of the said bankrupt, seeking relief under the fiat ; and as to the costs of the petitioner and assignees, of and occasioned by this application, this Court doth declare, that the said petitioner is to bear and pay so much of his own costs, and of the costs of the said assignees, as have been incurred or increased by the loss of the written memorandum in the said petition mentioned.

Lincoln's Inn,
March 8.

Ex parte SANDERSON.—In the matter of EVANS.

In an Order appointing an inspector, liberty was given to him to apply to the Court, or to the Commissioner.

Costs of appointing an inspector do not, as of course, come out of the estate, on behalf of which he is appointed.

THIS was a petition for the appointment of an inspector, on behalf of joint creditors. After some discussion, it was arranged that a particular individual should be appointed ; and the only remaining questions were, as to the form of the Order, and as to the costs.

Mr. *Bacon*, in support of the petition.

Mr. *Russell*, for the assignees, submitted that the costs ought to be paid out of the estate, on behalf of which the inspector was appointed; and that the inspector should not have power of interfering, by applying personally to the Court; and he cited *Ex parte Kelly (a)*, where Lord Chancellor *Hart* said, that the duty of inspectors was to inspect all accounts in the bankruptcy, in which the class of creditors for whose benefit they were appointed were interested, and to communicate to those creditors the result of such investigation; and if those creditors thought it necessary, they, and not the inspectors, were to bring the matter before the Court; but that upon the petition of a mere inspector, no relief could be given.

1843.

Ex parte
SANDERS:JN.

The COURT ordered, that the petitioners and other joint creditors should be at liberty to prove for the purpose of receiving dividends out of the joint estate (if any); that separate accounts should be kept of the joint estate (if any); that the inspector on behalf of the joint creditors should be at liberty, at all reasonable times, and upon reasonable notice, to inspect all books, accounts, and proceedings, in or belonging or relating to the bankruptcy, for the purpose of ascertaining what, if any thing, had been received, or should from time to time be received by or on account of the joint estate, or of ascertaining of what it consisted; that the inspector should be at liberty to apply to the Commissioner, or the Court, as advised, relating to the matters aforesaid; reserving costs, with liberty to apply generally.

(a) 1 Molloy, 59.

1843.



*Lincoln's Inn,
April 4 and
June 26.*

Form of Order, in case of an assignee buying in, by mistake, a mortgaged estate of the bankrupt at a sale, under Lord Loughborough's Order. On such a sale, the assignees must have the conduct of it; and it is an improper practice for the sale to be conducted by the mortgagees.

Ex parte CUDDON.—In the matter of COCK.

IN this case there had been a sale of leasehold property, belonging to the bankrupt, at the instance of a mortgagee by demise, who, on the 27th February 1843, obtained an Order from this Court, giving him leave to bid at the sale. The sale was, as it was alleged, conducted as usual by the assignees; and one of the number, the present petitioner, to prevent the premises being sold for less than the value, instructed the auctioneer that lot 1 was not to be sold for less than 1040*l.*, nor lot 2 for less than 250*l.* Neither of the lots having reached the fixed price, they were declared to have been bought in by the petitioner. He now presented his petition, stating, that he was unaware at the time that it was not competent for him to buy the property in, without an Order of the Court; and praying that it might be resold. The petitioner submitted to conform to such terms as the Court should direct.

Mr. *Randall*, in support of the petition.

Mr. *Lee*, for the co-assignee, offered no opposition.

The Order was, for a reference to the Commissioners to enquire and report by whom the sale, and the preparations for a sale, were managed and conducted, and under what circumstances; and also to inquire and report, under what circumstances, the Order of the 27th February 1843, was applied for and obtained, and under what circumstances the sale took place, and the biddings, made by the petitioner, were made; and what consideration, in the opinion and judgment of the Commissioners, would be most for the benefit of the estate

to take, with reference to the matters aforesaid; with liberty to state special circumstances. And further directions and costs were reserved.

1843.

Ex parte
CUDDON.

Upon the petition coming on again on further directions, upon the Commissioner's report, it appeared that the mortgagee, and not the assignees, had had the conduct of the sale.

Lincoln's Inn,
June 26.

Mr. *Russell*, in support of the petition, said that such was a common practice, in the case of legal mortgages.

The CHIEF JUDGE inquired of Mr. *Swanston*, whether such was his impression as to the practice.

Mr. *Swanston*, *amicus curiæ*, said, he believed that the course generally followed was, for the sale to be conducted by the party having the legal estate.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I never heard of that practice. I always understood, that the mode of carrying into effect Lord *Rosslyn's* Order (1), was, for the assignees to have the conduct of the sale. Such seems to me the true construction of the Order; and I do not assent to any such practice as that of the mortgagee selling. The estate must be resold, the assignees having the conduct of the sale. Neither the mortgaged estate, nor the general estate, is to be charged with any costs.

(a) 8 March, 1794; see 2 Deac. B. L. 89.

1843,



Ex parte CHARLES EDWARD DAVIS, and CATHERINE DOROTHY his wife, JOHN CHALMERS, ADAM FREER SMITH, and LEWIS BALFOUR.—In the matter of DAVID CLARK.

Westminster,
May 3.

Where a fund, arising from dividends, upon a proof, has been transferred to the separate account of a marriage settlement; a petition, by parties claiming under the settlement, for payment of the fund out of Court, need not be served upon the assignees.

If, under a power to appoint new trustees, which is in the ordinary form, and is silent as to any increase in the number of trustees; four trustees be appointed in the room of three, (the original number), the appointment is bad, and the fund will not be paid over to the persons so appointed.

THIS was the petition of the trustees and *cestuis que trust* of a marriage settlement, for the payment and transfer of a fund arising from the dividend upon a proof, and standing to the credit of the settlement.

The settlement was dated the 2nd of March 1824, and was made between the petitioner *C. E. Davis* and his wife, of the one part; and the bankrupt and two other persons as trustees of the other part; in pursuance of articles of agreement entered into previously to the marriage. It contained a declaration of trust of 14,500 sicca rupees, which had been deposited with a firm in which the bankrupt was a partner, trading under the style of Messrs. *Fergusson, Clark & Co.* Bankers at Calcutta, and was entered in their books to an account, entitled “ Trustees of Mrs. *Catherine Davis* in account with *Fergusson, Clark & Co.*” The trusts were in favour of the husband and wife, and the issue of the marriage. The power of appointing new trustees was in the following form: “ Provided also, that in case the several parties by these presents named or appointed, or any of them, or any succeeding or other trustees or trustee of the said trust premises, to be nominated and appointed as herein-after is mentioned, shall depart this life, or be desirous to be discharged from the execution of the aforesaid trusts, or shall be about to quit the East Indies, or shall refuse or neglect or become incapable to act in the said trusts, before the same shall be fully performed or determined, it shall be lawful for the said *Charles Edward Davis*

and *Catherine Dorothy*, his wife, jointly, or for the survivor of them alone, and after the decease of such survivor of them, for the surviving or continuing or only acting trustees or trustee for the time being upon the spot, at any time or times, and from time to time as often as there shall be occasion, to nominate, substitute, or appoint any other person or persons to be a trustee or trustees in the place or stead of the trustee or trustees so dying, or desiring to be discharged, or being about to quit the East Indies, or refusing or neglecting or becoming incapable to act as aforesaid, for all or any of the purposes in these presents mentioned, and then remaining unperformed; and all and every such new trustee or trustees shall, and lawfully may, act in the execution of the said trusts, as fully and effectually to all intents and purposes whatsoever, and with the same or like powers, authorities and indemnification, in all respects, as if he or they had been originally appointed a trustee or trustees by these presents."

The fiat issued in England, against the bankrupt alone, in 1835, an adjudication of insolvency having been previously made in Calcutta against the firm of *Fergusson, Clark & Co.*

The petitioner *C. E. Davis* had proved in respect of the trust fund a debt of 920*l.* 15*s.* and interest, under an Order of this Court, dated July 10th 1839, and the dividends on the proof had been, in pursuance of the Order, carried to the credit of the matter of the bankruptcy, to an account entitled "The account of the settlement, made on the marriage of *Charles Edward Davis* and *Catherine Dorothy Farquhar*," and invested in 3*l.* per cent. Annuities.

All the three trustees had died; and by an indenture dated April 1st 1840, and made between the petitioners

1843.

Ex parte
DAVIS
and others.

1843.

Ex parte
DAVIS
and others,

C. E. Davis, and *Catherine Dorothy*, his wife, of the one part, and *Sir Arthur Farquhar*, *John Chalmers*, *Adam Freer Smith*, and *Lewis Balfour*, of the other part, the petitioners *C. E. Davis*, and his wife, in exercise of the power [in the settlement, appointed *Sir A. Farquhar*, *J. Chalmers*, *A. F. Smith*, and *L. Balfour*, to be trustees in the room and stead of the aforesaid *W. Farquhar*, *D. Clark*, and *J. C. Burton*, (all then deceased) to act in the trusts of the settlement.

Sir A. Farquhar having declined to act in the trusts, the prayer was, that the fund might be transferred to the other three new trustees.

Mr. G. L. Russell, in support of the petition, said that the petition had not been served on any one, as the fund was carried to a separate account, and it had, therefore, in conformity with the practice in Chancery, been thought unnecessary to serve the assignees.

His Honour considered it unnecessary to serve them; but felt a difficulty in making the Order, owing to the mode, in which the power of appointing new trustees had been exercised, four having been appointed, in the stead of three, the number fixed upon by the settlement. The petition was ordered to stand over, that the authorities might be looked into.

Mr. G. L. Russell, on another day, cited *Sands v. Nugee* (a), and *D'Almaine v. Anderson* (b).

(a) 8 Sim. 130.

(b) *Lewin on Trustees*, 465, (2nd edition.) The number of trustees, appointed by the will, was two, and the clause provided, that it should be lawful for the continuing or surviving trustee or trustees for the time being, or the executors or administrators of the last surviving or continuing trustee, to appoint one or more person or persons to be a trustee or trustees, in the room of the trustee or trustees so dying, &c.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—In *Sands v. Nugee*, the settlement was in the Scotch form, and, in *D'Almaine v. Anderson*, the words of the power seem to contemplate the appointment of more than the original number of trustees. In this case four were appointed; so that there might have been an equal division upon a difference of opinion, a result which it might have been intended to avoid, by the appointment of three trustees. Who is to determine what is the proper number, if that originally selected be departed from? I think the power was not well executed.

1843.

Ex parte
DAVIS
and others.

No ORDER made.

Ex parte THOMAS.—In the matter of THOMAS.

THE fiat in this bankruptcy was sued out by *Robert Swann, John Swann, George Swann, and John Clough*, as the surviving partners of *John William Swann*, deceased. A fiat had previously been sued out by the same parties, in the lifetime of *John William Swann*, and in conjunction with him; but it had been annulled by an Order of the Court, of the 30th November 1842, in which order, the usual reservation of leave to issue another fiat was omitted. A petition was now presented by the bankrupt to annul the present fiat, on the ground of the former order, and on account of the fiat having been sued out, without any special leave having been previously obtained, for that purpose.

May 8.

The rule that after a fiat has been annulled, the same petitioning creditor cannot sue out a new fiat against the same trader, without the leave of the Court, does not render it imperative upon the Court to annul the new fiat sued out without such leave.

Mr. *Swanston*, and Mr. *Faber*, in support of the petition. It is clearly the rule of the Court, that, after a fiat

1843.

Ex parte
THOMAS.

has been annulled, the same petitioning creditor cannot sue out a new fiat, without the leave of the Court. This is sufficiently proved by the form of the Orders, in which, whenever it is intended that the petitioning creditor should be at liberty to sue out another fiat, the Order to annul is always expressly made, without prejudice to his so doing—a saving clause, that would be wholly unnecessary, in the absence of such a rule. The origin of the rule is left in some obscurity; it is referred, in Montagu and Ayrton's Bankrupt Law (a), to an Order of Lord Thurlow of the 6th December 1788, whereby the Secretary of Bankrupts was directed not to allow a petitioning creditor, who had sued out one commission of bankrupt, and neglected to prosecute the same, to sue out a second commission, without the leave of the Court. This Order has never been published, and is no doubt, in terms, confined to the case of a supersedeas, for want of prosecution; but, in the text-book to which we have referred, it is stated generally, that no creditor can be permitted to sue out a second fiat, without leave; and it would be very singular, that the prohibition should apply to a supersedeas for want of prosecution, and not to the more aggravated case of a creditor, suing out a fiat, when the legal requisites do not exist. [The *Chief Judge*. Mr. Christian, I find, lays down the proposition in the same general terms (b). His Honour also referred to *Ex parte Masterman* (c).] The records of the Bankrupt Office show, that this qualification has always been introduced into Orders to annul a fiat, either for legal or equitable invalidity, and has not been confined to Orders to annul for want of prosecution. It is true, that there

(a) Vol. i. p. 102.

(b) Christian's Bankrupt Law, vol. 2, p. 24, 2d edit.; and see 1 Deac. B. L. 122.

(c) 18 Ves. 298.

is no case in print upon the subject, and if it be now a matter of doubt, it is time that such a doubt should be terminated on a question of so much importance.

1843.

Ex parte
THOMAS.

Mr. *Anderdon*, for the petitioning creditor, was not called upon.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I believe the rule only applies, as between different petitioning creditors, and has nothing to do with the bankrupt. But I give no positive opinion upon the point. The only objection, urged against this fiat, is, that it was issued without the special leave of this Court. Now, granting that there is any foundation for the objection, it is an objection, which it cannot be beyond the discretion of this Court to deal with. This does not appear to me a case, in which I should properly exercise that discretion, by annulling the fiat.

Petition dismissed, costs of bankrupt reserved, costs of the other respondents to come out of the estate.

Ex parte BURY.—In the matter of BURY.

Westminster,
May 8.

THE bankrupt in this case had been removed from the office of assignee of the effects of an insolvent debtor, and, on his removal, a balance of 326*l.* 6*s.* 7*d.* was due from him, which he was ordered to pay into the Court for Relief of Insolvent Debtors. On the 25th of February 1843, the fiat issued, and the bankrupt surrendered on the 27th, on which day, process issued against him

The bankrupt's privilege from arrest extends to a committal under the Act for the Relief of Insolvent Debtors, for nonpayment of a balance due from the bankrupt, as assignee under that act.

1843.

Ex parte
Bury.

out of the Insolvent Debtors' Court, under the 7 *Geo. 4.* c. 57 (a). His protection, under the bankruptcy, was extended to the 7th of April. On the 27th of March he was arrested, under the process of the Insolvent Debtors' Court, and now presented his petition to be discharged.

Mr. *Wigram*, in support of the petition. In the case of *Re M'Williams* (b), the bankrupt was taken under the process of a Court of Equity for contempt; and it was argued, as it probably will be here, that such a proceeding was not within the scope of the 117th section of the 6 *Geo. 4.* c. 16., and was not contemplated by the act. But Lord *Redesdale* said, "There can be no doubt that the thing to be considered is, not the form of process, but the cause of issuing it; if the ground of the proceeding be a debt, it is a process of debt." "The object of the act of parliament is, that a party, bankrupt, shall not be liable to any arrest by a creditor in coming to surrender, and during his examination;—that creditors shall not be at liberty to interrupt the proceedings under the commis-

(a) 7 *Geo. 4.* c. 57. s. 39. And be it further enacted, that in case any such assignee so removed as aforesaid, or the heirs, executors, or administrators of any deceased assignee, or any of them, shall not account for and deliver up such estate and effects, books, papers, writings, deeds, and other evidences as aforesaid, or shall not pay over the balance of the produce of any such estate or effects found to be in his or their hands, in obedience to the order of the said Court made thereupon, and notified to him or them respectively, it shall and may be lawful for the said Court to order the person or persons so offending to be arrested and committed to the prison of the King's Bench, or to the common gaol of any county, where he or they shall be, or where he or they shall usually reside, there to remain without bail or mainprize, until such person or persons shall have fulfilled the duty required by this act, or until the said Court shall make order to the contrary.

(b) 1 Sch. & Lef. 169.

sion,—and that the bankrupt shall be forthcoming to be examined. It is held out to him, as a protection, during that examination, which is to produce a disclosure of all his effects, and which is a proceeding in the nature of an execution in favour of all creditors, at the time of the act of bankruptcy committed, who come in to take the benefit of it.” And again “Every mode, by which a creditor can arrest a bankrupt for a debt, comes within the meaning and general words of the act. That the process resorted to is a process of contempt, signifies nothing.” In *Ex parte Parker* (a), the bankrupt had absconded, to avoid payment of money reported to be in his hands as assignee in a commission of bankruptcy, and which he was ordered to pay under an award. After the commission issued, and while he was attending his examination, he was arrested under an attachment for contempt in not paying the money. It was contended not to be within the protection, not being an arrest for debt; but the Lord Chancellor said, it was merely an attachment to enforce the payment of the money, and discharged the bankrupt. And there is a recent case to the same effect, *Ex parte Jeyes* (b), where Lord Chancellor Brougham said, that an attachment for contempt for non-payment of money, though sounding as a criminal procedure, had always been looked upon by the Courts as in the nature of a civil process; and his Lordship discharged the bankrupt, who had been arrested under an attachment from the Court of Chancery for contempt, in not paying a sum of money, pursuant to an order of the Court.

1843.

Ex parte
Bury.

Mr. Piggott, for the provisional assignee of the Insolvent Debtors' Court, *contra*, relied on the pro-

(a) 3 Ves. 554.

(b) 3 D. & C. 764.

1843.

Ex parte
Bury.

visions of 7 *Geo. 4.* c. 57. s. 39., and contended that the cases did not apply, as the process here was that of the provisional assignee of the Insolvent Debtors' Court, who was not a creditor, but the officer of the Court.

The CHIEF JUDGE.—He represents the general body of creditors.

Mr. *Wigram* was not called upon to reply.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The observations of Lord *Redesdale*, in *Ex parte M^cWilliams*, completely meet the case. It is the debt, and not the form of process, which is to be considered.

ORDER for discharge made on the provisional assignee, without costs.

Ex parte JOSEPH NORTON and JOHN RODGERS.—In the matter of JOSEPH RALEIGH, THOMAS SMITH GOODE, and WILLIAM HOLLAND.

Westminster,
May 8.

Mortgagor and mortgagee join in demising trade premises to a lessee, and at the same time the mortgagee and lessee enter into partnership by articles, ac-

cording to which the demised premises are to be considered as partnership property. The lessee becomes bankrupt. *Held*, that the Court had jurisdiction to order the assignees to elect whether they would take or abandon the premises; and *semble*, that the Court has jurisdiction to order the assignees to pay the landlord's costs. But it will not so order, in general, nor unless under special circumstances.

BY an indenture of lease dated January 2d 1837, made between the petitioner *Norton* of the first part, the petitioner *Rodgers* of the second part, and the bankrupt *Raleigh* of the third part, *Norton* and *Rodgers* demised to *Raleigh* for ten years certain mills and premises,

which had been previously mortgaged by *Norton* to *Rodgers*, in fee.

By articles of partnership of even date with the lease, and made between *Raleigh* of the one part, and *Norton* of the other part, reciting the lease, and that *Norton* had theretofore carried on business at the mills and premises thereby demised, *Raleigh* and *Norton* covenanted with one another, that the demised mills, buildings and premises, and the stock in trade, debts, effects, boilers, steam-pipes, machinery, implements and utensils, should be taken and considered as the property of the partnership.

Under these articles *Raleigh* and *Norton* carried on business in partnership till August 6th 1842, when a separate fiat issued against *Raleigh*, which was annulled in November 1842. *Raleigh* also carried on a distinct trade with *Goode* and *Holland*, against whom and himself the present joint fiat was issued. *Norton* and *Rodgers* now presented a petition under the latter fiat, praying that the assignees might elect whether they would accept or abandon the lease, and might be ordered to pay the costs.

The accounts of the partnership between *Raleigh* and *Norton* had not been yet adjusted; but *Norton* had all along occupied, and still continued to occupy and carry on business upon the demised premises.


Mr. *Swanston* and Mr. *Tillotson* in support of the petition.

Mr. *Rolt* for the assignees. The 6 Geo. 4. c. 16. s. 75. extends expressly to the case, only, of a bankrupt "entitled to a lease, or an agreement for a lease," neither of which descriptions is applicable here,—the bankrupt being only a trustee for himself and the petitioner *Norton*

1843.



Ex parte
NORTON
and another.

1843.

Ex parte
Norton
 and another.

and, therefore, being only entitled to one moiety of the lease beneficially. It may turn out, upon taking the accounts, that something is due from *Norton* to *Raleigh*: and, as the result of these accounts may guide the assignees in making their election, they ought not to be compelled to elect, before those accounts have been taken. At all events, the Court cannot order the landlord's costs to be paid out of the bankrupt's estate, the legislature not having subjected the general body of creditors to any such burden; *Ex parte Bright* (a); and, without such authority, the Court cannot give them. In Sir *S. Romilly's* act, substituting a remedy, by petition, for that, by bill, in charity cases, jurisdiction, as to costs, is expressly given; from which it may be presumed, that the legislature considered such special jurisdiction necessary.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Neither, as to the substance of the case,—the jurisdiction of this Court to order the assignees to elect,—nor as to its jurisdiction, to order them to pay costs, do I feel any difficulty, unless I am concluded by some authority, which has not been referred to. Independently of the act of 6 *Geo. 4. c. 16.*, I apprehend, the Court could order the assignees to act, with regard to the matter, in such manner, as it thought fit, and would be doing no more than it constantly does, in ordering the assignees to deliver up short bills, on the failure of bankers. And, with reference to the question of costs,—by the express terms of the section in question, the Lord Chancellor may order the assignees to elect and deliver up the lease, if they decline it, and the possession of the premises,—or may make such other order therein as he shall think fit. My impres-

(a) 2 G. & J. 79; see *Ex parte Hopton*, 2 M. D. & D. 349, and 1 & 2 W. 4. c. 56, s. 5.

sion is, however, that, in the absence of special grounds, the Order should be, without costs; and here no special grounds are made out.

It was then agreed, that the petition should stand over till a certain day, with a view to an arrangement, and it was on a subsequent day, by consent, ordered to stand over generally.

1843.

Ex parte
NORTON
and another.

Ex parte WOOD.—In the matter of LOOSEMORE.

Westminster,
May 31.

THIS was the ordinary petition of an equitable mortgagee by deposit, with a written memorandum; and the only question, that arose, regarded two of the deposited documents, which were policies of assurance on lives for 300*l.* and 1000*l.* Of these policies the bankrupt was himself a mortgagee; they having been assigned to him by one Mrs. *Forwood*, as a further security for a debt of 600*l.*, primarily secured by a mortgage of her life interest in a plantation in Jamaica, and in an estate in Somersetshire. No notice was given at the insurance office of the mortgage of the policies to the bankrupt; nor was any notice of the equitable mortgage, by the bankrupt, to the petitioner given either to Mrs. *Forwood*, or to the office; and the question was, whether the latter transaction was complete, as regarded the policies, so as to give the petitioner a good title, as against the assignees.

A mortgagee of a policy of assurance creates an equitable submortgage of it, by deposit, and becomes bankrupt. No notice of the original mortgage is given to the office, nor is any notice of the submortgage given either to the office, or to the mortgagor. Held, that the sub-mortgage was invalid, as against the assignees.

Mr. *Bacon*, in support of the petition. This case differs from *Ex parte Arkwright* (a), lately before the Court. In *Ex parte Arkwright*, the bankrupts, who

(a) *Ante*, p. 129.

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Ex parte
Wood.

were, as in this case, equitable mortgagees of policies of assurance, had given notice of their mortgages to the insurance offices; and the policies were, consequently, in their reputed ownership; and your Honour's judgment expressly proceeds upon the fact, of their having so perfected their title. In all the cases upon the point, the only circumstance, which has been held to prevent the equitable mortgage, without notice to the office, from prevailing against the assignees, has been, that the policies were in the reputed ownership of the bankrupt. Take away that fact, and the lien is good. Now here the fact does not exist; all the authorities which in the other cases were opposed to the lien-creditor, are in this case strongly in his favour; for they prove that the bankrupts, who gave no notice of their own claim upon the policies, cannot be considered the reputed owners of them. *Ex parte Newton* (a), which is quite consistent with *Ex parte Arkwright*, is conclusive in our favour.

Mr. Shapter, for the assignees, cited *Roberts v. Lloyd* (b), but was stopped by the Court.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—It seems to me, that, putting the petitioner's case at the highest, it only amounts to this, that the insurance offices will owe to the mortgagor money, which they would be bound to pay to her, if they had no notice of the original assignment, by way of mortgage. But, when she received those monies, she would be a trustee of them for the bankrupt, who might attach them in her hands. That is the liability, under which she would have been. Being thus entitled to receive monies from her, the

(a) 4 D. & C. 138.

(b) 2 Beav. 376.

bankrupt pledged this right, without communicating the transaction to her, leaving her therefore under the impression that he was still the party entitled to receive from her these monies. Now, the reason of the enactment of the 72nd section of the Bankrupt Act was, that, by the apparent ownership of property, a false credit was obtained. Does not that apply here? The bankrupt might have said, "I have lost the policies; but they were deposited with me by Mrs. *Forwood*, who will tell you so." Did not the petitioner, by omitting to give notice either to the office or to Mrs. *Forwood*, enable the bankrupt thus to obtain a delusive credit? The mere absence of the instrument has not, since Lord *Thurlow's* time,—that is, for more than half a century,—been held sufficient to take the property out of the order and disposition of the bankrupt. That fact, therefore, may be laid aside; and the right transferred may be regarded simply as one, to receive from *A. B.* a sum, which *A. B.* is entitled to receive from another party; in which case the necessity of notice to such party is, as I consider, well established.

1843.

Ex parte
Wood.

Petition dismissed.

Ex parte STEVENS.—In the matter of BURGON.

Westminster,
May 31.

THIS was the usual petition of an equitable mortgagee, with a written memorandum.

Assignees are entitled to have the direction of the Court, with regard to the rights of parties claiming to be

Mr. *Bichner*, in support of the petition, submitted

equitable mortgages of property of the bankrupt; and are therefore entitled to their costs out of the mortgaged estate, although they have been requested to concur in a sale, without a petition being presented.

1843.

Ex parte
STEVENS.

that, the case being perfectly clear, the assignees, who had been requested to concur in a sale, without obliging the mortgagee to present this petition, ought to pay their own costs. He cited *Ex parte Bate*(a), and *Ex parte Young* (b).

Mr. Rogers, for the assignees.

The COURT held, that the assignees were entitled to have the direction of the Court, in cases of equitable mortgage, and that they must therefore have their costs out of the mortgaged estate.

(a) 1 Mont. & Ch. 58 ; 4 Deac. 46.

(b) 1 Mont. & Ch. 599.

Westminster,
May 31.

A petitioning creditor, who complains that the assignees have not complied with the Commissioners' Order, directing his bill of costs to be paid, although they have received monies applicable to that purpose, may apply to this Court, in the first instance, and without the assignees being previously summoned before the Commissioner to produce their accounts.

Ex parte RUSHWORTH.—In the matter of BROWN.

THIS was the petition of the petitioning creditor, who was also solicitor to the fiat, for payment of the balance due upon his bill of costs.

The fiat issued on the 19th February 1831; on the 2nd April 1831, assignees were chosen. The petitioner's bill of costs, as petitioning creditor and solicitor to the commission, having been taxed and allowed at 66*l.* 12*s.* 6*d.*, the Commissioners ordered the assignees to pay that sum to the petitioner out of the first monies or effects of the bankrupt, which should be got in or received under the commission. In August 1842, the assignees paid the petitioner 9*l.* 0*s.* 6*d.* on account of his bill, and he had received some sums on account of the estate, and applied them in reduction of the amount due to him ; but

he now stated by his petition and affidavit, that upwards of 40*l.* still remained unpaid, although he had reason to believe that more than sufficient to discharge this balance had been received by the assignees. This, however, the assignees denied by their affidavit in opposition to the petition.

1843.

Ex parte
 RUSHWORTH.

Mr. *Lush*, for the petition.

Mr. *T. Turner*, for the assignees, objected, that the petitioner ought not to have come to this Court, in the first instance, but should have previously applied to the Commissioners, who have power to summon the assignees and compel them (if necessary) to produce their accounts. That was the only way of satisfying the Court of the truth of such a charge as the present against the assignees, and, if it had been adopted in this case, would have prevented the petition from being presented; as it would have appeared that no funds had been received by the assignees, applicable to the payment of the petitioner's bill, beyond what was so applied by them; *Ex parte Granger* (a).

The COURT, however, made an Order, referring it to the Commissioner to take an account of what was due, and inquire whether the assignees had received any and what funds available to reimburse the petitioning creditor his costs, or any and what part thereof.

(a) Mont. & M'Arth. 289.

1843.



Ex parte THOMAS WRIGHT.—In the matter of THOMAS WRIGHT, RICHARD BURGESS, and RALPH TAYLOR.

May 31.

1. The Commissioner has power to dispense with the attendance of the petitioning creditor at the opening of the fiat.

2. The circumstance that the affidavit of debt was sworn before the solicitor to the petitioning creditor, held not sufficient ground for annulling the fiat; but it is an improper practice, and, if it become general, may be hereafter considered sufficient ground.

THIS was the petition of one of the bankrupts to have the fiat annulled, on the following, among other grounds; that at the opening of the fiat, the attendance of the petitioning creditor had been dispensed with, without an Order of the Court, and that the affidavit of debt was sworn before the solicitor to the petitioning creditor.

Mr. *Bacon*, in support of the petition.

Mr. *Lovat*, for the other bankrupts.

Mr. *Swanston*, for the assignees, referred to *In re Elford* (a).

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—As far as the objections to the fiat are legal, I shall leave the petitioner to sustain them at law. But, with regard to the petitioning creditor not having been present at the adjudication,—the 12th of the new Orders (b) seems either to recognize a power in the Commissioner to dispense with the attendance of the petitioning creditor, or to confer, although impliedly and indirectly, such a power, if it did not previously exist. And I must conclude that special cause was shown, to the satisfaction of the Commissioner, for the course which he has taken.

The objection, that the affidavit was sworn before the solicitor to the petitioning creditor, is not one, to which the Court is bound to accede, nor one to which I shall

(a) 2 G. & J. 65.

(b) Appendix, page xii.

accede, in the present case. It is an objection, however, for which the Court might in its discretion direct the whole of the proceedings to be annulled; and if the practice should become frequent, the Court will perhaps consider that circumstance a sufficient cause for annulling the fiat.

1843.

Ex parte
WRIGHT.

Petition dismissed; costs of all parties out of the estate, and petitioner to be at liberty to bring an action, if so advised.

Ex parte EAST.—In the matter of EAST.

*Lincoln's Inn,
June 26.*

THIS was the bankrupt's petition for the allowance of his certificate. Notice had been given in the Gazette of two public meetings for the bankrupt to surrender and conform, the last of which meetings was appointed for the 42nd day, after the giving of such notice. At the first of these meetings the bankrupt finished his examination. An advertisement for the allowance of the certificate on the 6th of December, was inserted in the Gazette on the 15th of November.

The Court declined allowing the certificate of a bankrupt, who had passed his last examination before the 42nd day, and ordered another day to be advertized for his last examination.

On applying at the bankrupt office after the 6th of December, the bankrupt's solicitor was informed that the certificate was defective, as it stated that the bankrupt passed his last examination on the first of the meetings, instead of the second. The prayer was, that the certificate might be allowed, or that the Court would direct the Commissioners to appoint a time and place for taking the bankrupt's last examination, and that the same might be duly advertized.

Mr. Swanston, in support of the petition.

1843.

Ex parte
EAST.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. —I do not at present doubt, though I give no judicial opinion on the subject, that, in point of form, the bankrupt might pass his last examination before the 42nd day. But the substantial difficulty is, that some creditors, who might intend to oppose the bankrupt's passing, might wait till the 42nd day. It will be to the bankrupt's advantage, that the proceedings should be clearly regular. Let another day be appointed.



Ex parte FROGGATT.—In the matter of HUGH PARKER,
OFFLEY SHORE, JOHN BREWIN, and JOHN RODGERS.

Lincoln's Inn,
June 28.

Where short bills had been deposited with country bankers, and had been by them indorsed to their agents in London, who had a lien upon them for advances to the country bankers: Held, on the bankruptcy of the country bankers, that the proceeds of the bills, after satisfying the lien of the London bankers, ought to be distributed rateably among the depositors of the short bills.

THE bankrupts were bankers at Sheffield, and this was the petition of a person who had deposited with them a bill of exchange, praying for payment in full of the amount. The bill, which was dated Madras, October 19th, 1842, and was drawn upon Messrs. *Fletcher, Alexander & Co.*, London, payable at thirty days' sight, had been remitted to the petitioner, indorsed to his order. On the 12th of December 1842, the petitioner, who was not a customer of the bankrupts, inquired at their banking-house how he was to procure payment of the bill, and was informed by a clerk, that the bill must be sent up to London, and remain there till it was paid; and the clerk then told the petitioner to indorse the bill, and to call again on the 16th of January at the bank, when he might expect to receive the amount of the bill. The bankrupts made no advance on the bill, but indorsed it specially to their London agents, in whose possession it was at the time of the bankruptcy. The fiat issued

on the 16th of January, and the amount of the bill was received by the London agents on the 18th, and was placed by them to the bankrupts' credit.

1843.

Ex parte
FROGGATT.

Mr. *Smale*, in support of the petition, cited *Ex parte Armistead (a)*, and *Ex parte Atkins (b)*.

Mr. *Bigg*, for the assignees, cited *Collins v. Martin (c)*, and *Ex parte Pease (d)*.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I have always considered it plainly settled, that, when a country banker sends bills to his London agent, indorsed generally to receive payment of them, those bills, on the bankruptcy of the country banker, are not lost to the owners of them, although the London banker has usually a lien for the balance due to him from the country banker. It has long been settled, that, if the parties entitled to the bills come in and make application here, that species of equity can be administered in bankruptcy; and it does not lie with the assignees to object. There must be an account of how much is due, in respect of the lien of the London bankers, and how many other bill-holders there are in a similar situation with the petitioner; and, after satisfaction of the lien out of the proceeds of the bills, the residue must be distributed rateably among the bill-holders, without any preference of one over another.

ORDERED accordingly.

(a) 2 G. & J. 371.

(b) See *ante*, p. 103

(c) 1 B. & P. 648.

(d) 19 Ves. 25; 1 Rose, 242.

1843.

*Lincoln's Inn,
July 1 and 15,
before the
Lord Chan-
cellor.*

Ex parte JOSEPH BOWKER and JAMES WHITELEGG.—

In the matter of RICHARD POTTER, JOHN POTTER,
and JAMES POTTER.

The appointment of an official assignee is a matter peculiarly within the discretion of the Commissioner, with which the Lord Chancellor will not interfere, unless under very strong circumstances. Therefore, although an estate had been nearly wound up, before the passing of the 5 & 6 Vict. c. 122, and it was stated that all that remained to be got in consisted of the damages recovered in an action by the creditors' assignees, who had expended large sums out of pocket in the prosecution of the action, the Lord Chancellor refused to direct that no official assignee should be appointed.

THE fiat in this case issued before the passing of the act 5 & 6 Vict. c. 122, and, after the passing of that act was transferred to the District Court of Manchester. This was a petition to the Lord Chancellor, presented by the creditors' assignees, who had been chosen before the passing of the act (a), praying that no official assignee might be appointed of the bankrupts' estate. The bankrupts passed their last examination on November 22d, 1841, when it appeared that the debts amounted to 34,603*l.* 1*s.* 9*d.*, and the liabilities to 5377*l.* 0*s.* 3*d.* The assets, besides the outstanding debts due to the bankrupts, amounted to 2096*l.* 4*s.* 1*d.*, and consisted of stock in trade and machinery, which had been seized under an execution. No dividend had been declared, nearly the whole of the assets having been expended in the prosecution of proceedings on the part of the assignees to dispute the validity of the execution. The result of the proceedings was a verdict for the assignees, with 2340*l.* damages, which were ordered to be invested in exchequer bills, and constituted nearly the whole of the assets for distribution among the creditors.

The petitioners stated, that they had incurred great personal liability in the proceedings, and had paid large sums out of their own monies, the funds in hand being altogether insufficient for the prosecution of the proceedings.

It was stated to be the invariable practice of the Manchester District Court of Bankruptcy to appoint an official assignee, under every fiat transferred and removed

(a) 5 & 6 Vict. c. 122, s. 53. See Appendix, p. xxii.

into that Court; and that the remuneration to the official assignee was very burthensome, being *5l. per cent.* on the first 100*l.* received, and *2½l. per cent.* on the first 500*l.*, and *1l. per cent.* on the residue, and a further allowance of *2l.* on the amount divided among the creditors(a), besides charges for examining accounts, and on the dividend warrants; that, in the present case, these allowances would amount to 400*l.*; and that as very little remained to be done under the present fiat, it was the opinion of the petitioners and the creditors, that the appointment of an official assignee would be entirely unnecessary, and would be productive only of loss and expense, in addition to that already incurred; and that nearly all the creditors, to the amount of 20*l.* and upwards, who had proved, concurred in this opinion and in the present application. The petition was accompanied by a paper signed by several creditors, testifying their concurrence in the prayer of the petition.

1843.

Ex parte
Bowker
and another.

Mr. *Bacon*, in support of the petition.

The LORD CHANCELLOR desired the matter to stand over, that he might communicate with the Commissioner on the subject.

The matter being again mentioned,

July 15.

The LORD CHANCELLOR declined to make any Order, considering the matter as one peculiarly within the discretion of the Commissioner, with which the Lord Chan-

(a) This is certainly a most extraordinary scale of remuneration, after the General Order of the 12th January 1832, by which it was settled that the official assignees should be allowed *one per cent. on the monies they received, and one and a half per cent. more on the monies actually divided*, subject to be increased or diminished under special circumstances to be referred to the Court of Review.—E. E. D.

1843.

Ex parte
Bowman
and another,

cellor would not interfere, unless under very strong circumstances.

Mr. *Bacon* then asked that the costs of the petition, which had not been served on any one, might be allowed out of the estate.

The LORD CHANCELLOR allowed them on this occasion, but wished it to be understood that the costs of applications of such a nature would not be allowed in future, except a very strong case were made.

Lincoln's Inn,
July 10.

Ex parte BALDWIN.—In the matter of BALDWIN.

Where the fiat and proceedings were, before the passing of the act 5 & 6 Vict. c. 122, left in the possession of the sole assignee, who was not to be found; the Court ordered that the Commissioner should be at liberty to proceed without them, in allowing the certificate.

IN this case, the fiat issued before the passing of the act 5 & 6 Vict. c. 122, and was prosecuted at Worcester. The proceedings were in the custody of the sole assignee. On the passing of the new act, the fiat was transferred to the Birmingham District Court; and, on the 3rd of May 1843, the bankrupt applied to the Commissioner, requesting him to call a meeting for the allowance of the certificate; but it appeared that the fiat and proceedings were not forthcoming, having been left in the possession of the sole assignee, who was not to be found. The Commissioner thought that he could not act, without having the fiat and proceedings before him. The bankrupt, therefore, now presented his petition, praying that a meeting might be called, for the purpose of allowing his certificate, and that service of the petition on the solicitor of the assignee might be deemed sufficient service on the assignee.

Russell, in support of the petition.

He did not appear.

The COURT ordered, that the Commissioner should be at liberty to call a meeting, and to proceed, notwithstanding the proceedings had not been recorded, and were not forthcoming.

1843.

Ex parte
BALDWIN.

Ex parte KATE FRANCES COLES, and JESSIE LOUISA COLES, infants, by WILLIAM JACKSON MONKHOUSE, their next friend.—In the matter of WILLIAM INMAN WELCH.

Lincoln's Inn,
July 10.

THIS was the petition of *cestuis que trusts*, for leave to prove for the value of a sum of stock, alleged to have been sold out by the bankrupt and a co-trustee, in breach of the trust, or else for the amount which the bankrupt had been ordered to pay into Court in a suit in Chancery, instituted against him by one of the petitioners.

The bankrupt, and one *Robert Welch*, were trustees under a marriage settlement, of (among other things) a sum of 2048*l.* 6*s.* 9*d.* three per cent. consols, upon certain trusts, for the benefit of the mother of the petitioners, for her life, and after her death, upon trust for the petitioners, equally, as tenants in common, to be vested interests, at their respective ages of twenty-one, or days of marriage, subject to a power of appointment by the mother, which had not hitherto been exercised.

This sum of stock had been sold out by the trustees; and *Robert Welch*, who was stated to be in insolvent circumstances, resided at Boulogne.

Infant *cestuis que trusts* being entitled to a sum of stock standing in the names of trustees, subject to a life interest in their mother, and to a power of appointment, which has not been exercised, —the trustees, in violation of the trust, sell out the stock, and advance the proceeds to the father of the *cestuis que trusts*. In a Chancery suit instituted by one of the infants, the trustees are ordered to pay into Court the amount which, by their answer, they admit to have received upon such sale. They do not comply with the

Order, but become insolvent, and one becomes bankrupt.—*Held*, that the *cestuis que trusts* were not entitled to an Order to prove against the estate of the bankrupt, either for the value of the original sum of stock, or for the sum ordered to be paid into Court, but only to an Order to go in and make such proof as they could establish; the dividends on the proof to be paid into Court.

1843.
Ex parte
Colles
and others.

The bankrupt, by his answer to the bill in the Chancery suit, admitted that he and his co-trustee had sold out the sum of stock, and received the proceeds, amounting to 1859*l.* 0*s.* 6*d.*, and that they had advanced and lent this sum to the petitioner's father, who had become bankrupt, taking from him, as a security, an assignment, by way of mortgage, of certain shares in the Monmouthshire Coal and Iron Company, and of a policy of assurance on the father's life; but which security was wholly valueless.

The Order of the Court of Chancery was dated the 8th of November 1842, and directed payment into Court, within fourteen days, of the sum of 1859*l.* 0*s.* 6*d.* This amount, or the original value of the sum of stock, the petitioners now sought leave to prove; the fiat having issued on the 13th January 1843, and the sum having never been paid into Court, in pursuance of the Order.

Mr. *Swanston*, in support of the petition.

Mr. *Russell*, for the assignees. The Order for payment into Court is for security only; it does not conclusively fix the bankrupt's estate with any debt, certainly not with the amount of the sum ordered to be paid into Court. The assignees would consent to the petitioners being allowed to go in and make such proof as they can establish.

The COURT said, the Order for payment into Court could only be considered evidence as against the assignees, that a breach of trust had been committed, and that, therefore, there was a debt to be proved, although the amount was not ascertained.

The ORDER was, for Mr. *Monkhouse*, on behalf of the infant petitioners, to make such proof as he could establish, and for the dividends upon the proof to be paid into Court.

1843.
Ex parte
COLLES
and others.

Ex parte YORKE.—In the matter of MAYS.

Lincoln's Inn,
July 15.

THIS was the petition of a legal mortgagee, who had bid for, and been declared the purchaser of the property comprised in his security at a sale, which had been made under the Order of the Commissioner. The assignees had had, as usual, the conduct of the sale; but the petitioner had not obtained, previously to the sale, an Order from this Court giving him leave to bid, and he now prayed that an Order for this purpose might be made *nunc pro tunc*.
Order, giving a legal mortgagee leave to bid, made after the sale, *nunc pro tunc*.

The bankrupt and the assignees consented to the application.

Mr. *Messiter* for the petition.

Mr. *Moore* for the assignees.

Mr. *Metcalfe* for the bankrupt.

ORDERED accordingly, the petitioner paying all the costs (a).

(a) See *Ex parte Pedder*, 1 M. & A. 327; 3 Deac. & C. 622.

1843.



*Lincoln's Inn,
July 13.*

The venue of a fiat will not be changed, because the existing means of communication, between the place of trading and the District Court to which it belongs, are not so convenient as those between the place of trading and another District Court.

In the matter of JOHN ORAM.

MR. Swanston, on behalf of the petitioning creditors in this case, moved that the fiat might be directed to the Bristol, instead of to the Exeter, District Court of Bankruptcy.

The bankrupt carried on business at Chard, in Somersetshire. Of eighteen creditors, being the whole number whose debts respectively amounted to 10% and upwards, six resided at Nottingham, two in London, one in Bristol, one in Taunton, one in Birmingham, and seven in Chard. Chard is twenty miles from Exeter, and in the Exeter district, but the only public conveyance between it and Exeter is the Yeovil mail, leaving Chard at a quarter past ten in the morning, and Exeter at half past one in the afternoon; so that going to Exeter from Chard, and attending a meeting and returning, would occupy two days; whereas from the facility afforded by railway, all parties from Chard could go to Bristol, and attend a meeting, and return the same day; and the creditors from Nottingham and Birmingham would be saved two days, and the creditors from London one day, in attending any meeting.

The CHIEF JUDGE said, these circumstances might be a reason for transferring Chard from the Exeter to the Bristol District, but, not being peculiar to this fiat, would not warrant the Court in changing the venue.

NO ORDER.



Ex parte LACKINGTON and others.—In the matter of
HAMLET (a).

1843.

Lincoln's Inn,
July 20.

THIS was an application, on the part of the assignees, for leave to fix a reserved bidding at a sale of the mortgaged estate of the bankrupt under the fiat.

On a sale under the fiat of premises mortgaged by the bankrupt, leave given to the assignees to fix such reserved bidding as the Commissioner might approve of.

Mr. H. Prendergast for the petition, cited *Ex parte Ellis (b)*.

Mr. Mylne, and **Mr. Steere**, consented on the part of the mortgagees.

The COURT refused to give the assignees themselves leave to fix a reserved bidding, but made an Order permitting them to fix such reserved price as the Commissioner might approve of.

The Order was not drawn up, as the sale had been appointed for the day following, and there was no time to apply to the Commissioner.

(a) *Ex relations* Mr. H. Prendergast.

(b) 3 D. & C. 297.

Ex parte JOSEPH RALPH.—In the matter of **MARMADUKE THOMAS.**—

Lincoln's Inn,
July 22.

THIS was the petition of a creditor, for an Order on one of the bankrupt's assignees to pay over the sum of

A., being indebted to B., absconds to America, upon

which B. sends out a power of attorney to an agent there to recover from A. what money he can, B. hearing of a similar proceeding by another creditor, sues out a fiat against A., and is chosen one of his assignees; and afterwards, B.'s agent in America obtains a sum of money from A., and remits it to B. in England. *Held*, that this money was received by B., in his character of assignee; and that B., having himself become bankrupt, might, under the 6 Geo. 4. c. 16. s. 105., be charged with the amount, together with interest at 5*l.* per cent., notwithstanding he had obtained his certificate.

1843.

Ex parte
RALPH.

335*l.*, with which he had been charged in account by the Commissioner. It appeared that, in February 1838, *Thomas* absconded and went to New York; upon which *Mr. Fawcett*, one of his creditors, sent out a power of attorney to an agent at New York, to attach any property which *Thomas* might have carried off with him. Another creditor, however, having pursued the same means of endeavouring to recover his own debt, *Fawcett* thought it advisable to make *Thomas* a bankrupt; and accordingly, on the 22d March 1838, sued out a fiat against him, treating the absconding to New York as the act of bankruptcy. On the 6th of April, *Fawcett* and another person were chosen assignees. Some time afterwards, in the same month of April, *Fawcett's* agent at New York, a *Mr. Butterfield*, received of the bankrupt a bill for 335*l.*, which he remitted to *Fawcett* in England, and which the latter got discounted; and it was the amount of the proceeds of this bill, with which the Commissioner had charged *Fawcett*, as having received the bankrupt's money in his character of assignee. Subsequent to these proceedings, *Fawcett* himself had become bankrupt, and obtained his certificate.

Mr. Swanston, and *Mr. James*, in support of the petition, referred to the 6 *Geo. 4. c. 16. s. 105.*, by which it is declared, that if any assignee, indebted to the estate of which he is such assignee, in respect of money retained by him in his hands, shall become bankrupt, his certificate shall only have the effect of freeing his person from arrest and imprisonment, and his future effects shall remain liable for so much of his debts to the estate, of which he was assignee, as shall not be paid by

dividends under his bankruptcy, together with lawful interest for the whole debt. The present application is made in conformity with this provision of the statute, namely, that the assignee may be ordered to pay the sum of 335*l.*, with which he has been charged by the Commissioner in respect of money retained in his hands, together with interest at the rate of 5*l.* per cent. per annum. This Order will have the effect of a judgment at law, under the provisions of the 1 & 2 *Vict.* c. 110. s. 18.; and the petitioner is confident of obtaining the money for the benefit of the general creditors of the bankrupt *Thomas*, by attachment of certain property of the assignee acquired since he obtained his certificate, if the petitioner is only armed with an Order of this Court. In *Ex parte Turner* (a) a similar Order was made on an official assignee, who had neglected to pay over a sum of money which he had received under the fiat. The assignee has refused to account for this sum, on the ground that he received it in his own right, as a creditor pursuing his own remedy, and not in his character of assignee; but the fact is, that he was appointed assignee, and acted in that character, some time before the receipt of the money in England.

1843.


Ex parte
 RALPH.

Mr. *James Russell*, for the assignee. The 105th section of the 6 *Geo.* 4. c. 16., as well as the 104th section, apply only to cases where the money comes to the hands of the party *as assignee*. Here the property came into the possession of *Butterfield*, at New York, as the agent of *Fawcett*, quite independent of his character of assignee. *Fawcett*, therefore, having become bankrupt,

(a) 2 Mont. Deac. & D. 481.

1843.


Ex parte
RALPH.

we submit that this is a debt from which he is protected by his certificate. But, if the Court should think that this case comes within the penal operation of the 105th section, the petitioner is not entitled to the Order which he asks, until he shall have proved under the fiat against the assignee, and received dividends in part payment of the debt.

Mr. *Swanston*, in reply. The only point that can be made in this case is, whether the petitioner is, under the 105th section, entitled to an Order for the full amount of the 335*L*, or only for so much as shall not be paid by dividends under the fiat against the assignee. Now that section does not impose on the petitioner the burthen of proving the amount under the fiat against the assignee; and the present application is not inconsistent with the privilege, as to the right of proof given to the creditor against the assignee. No doubt, the debt might be proved; but the question is, whether the creditor is bound to exercise this privilege. The object of the legislature seems to have been, under this state of circumstances, to impose a liability on the future estate of the assignee, notwithstanding his bankruptcy. If this be so, then the inference would be, that the debt was not proveable under his fiat. We submit, therefore, that the petitioner has a right to avail himself, or not, of the privilege given by the act. To hold that he was compelled to prove, the privilege given would be quite illusory. There is, however, an intermediate mode of proceeding that might be adopted by the Court. The Order might be, to declare the future estate of the assignee to be liable for the amount of the debt, and

then direct that proof shall be made for the amount under his fiat, and that the dividends received under such proof shall be deducted from the amount of the debt.

1843.

Ex parte
RALPH,

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The party, against whom this application is made, sues out a fiat against his debtor, and on the 6th April consents to become assignee. In the course of the same month of April, but on what precise day does not appear, Mr. *Butterfield*, the assignee's agent at New York, obtains certain property from the bankrupt, converts it into money, and transmits the amount to the assignee in England. The agent, having got possession of this property after the bankruptcy of *Thomas*, would, of course, be personally liable to refund it, and could not discharge himself from such liability, unless he were discharged by the assignees. Why then is *Butterfield*, the agent, not so liable? Simply, because he has paid it over to the assignee, who has given him a discharge, which discharge could only be valid, as being given in his character of assignee. These are the facts; and now the question is, whether the Order of the Commissioner is good, charging the assignee with the amount of the money so received by him, together with interest at 5l. per cent. I am of opinion, that the Commissioner was perfectly justified in that proceeding. Let the Order therefore on this petition declare, that at the time when *Fawcett* became bankrupt, he was indebted to the estate of *Thomas*, in respect of money retained by him, within the intent and meaning of the 105th section of the 6 Geo. 4. c. 16.—Declare the amount of such debt to have been the sum of 335l. in the petition mentioned, carry-

1848.

Ex parte
RALPH.

ing interest at the rate of 5*l.* per cent. per annum, from the 7th of September 1838, from which day the assignee is to be considered as having so retained the said sum. The Order to be without prejudice to any set-off or claim, which *Fawcett* may have against the estate of *Thomas*, in respect of any demand for disbursements or otherwise. Refer it to the Commissioner to inquire, whether *Fawcett*, in his character of assignee, has any such demand against the estate of *Thomas*. The petitioner to have no costs up to this time, but to pay 5*l.* to *Fawcett* for costs occasioned by the introduction of needless matters into the petition and affidavits; and future costs to be reserved. This Order to be without prejudice to the duty of the Commissioner to remove the assignee, pursuant to the directions of Lord *Rosslyn's* General Order (a). The petition in other respects to stand over.

(a) 8th March 1794. See 2 Deac. Bank. Law, 89.

Ex parte ROBERT OULTON.—In the matter of JOHN OULTON.—

Lincoln's Inn,
July 24.

Where an assignee petitioned for the removal of his co-assignee, on the ground of misconduct, which was denied by the latter, who re-
criminated,—a special reference was directed to the Commissioner, to inquire into and report the circumstances of the case.

THIS was the petition of an assignee for the removal of his co-assignee, on the ground that, by the misconduct of the latter, the petitioner had been unable to realize the bankrupt's property. It was alleged, that portions of an estate belonging to the bankrupt had been let to various tenants, and that the bankrupt had been employed and paid for collecting the rents, but that his authority had been subsequently withdrawn. That a part of the estate, called the Chamber Hill Farm, was retained by the bankrupt in his own possession, who claimed it in

right of his wife, under the will of one *James Newton*. That, notwithstanding the petitioner had given notice to the tenants not to pay any more rent to the bankrupt, the bankrupt still continued to receive the rents, and in one instance caused the goods of a tenant to be distrained for rent, alleged to be due to the bankrupt and his wife; and that *Worthington*, the other assignee, had caused a counter-notice to be served on the tenants, ordering them to pay the rents to the bankrupt.

In answer to the statements in the petition, it was alleged by the respondent, that the present application had not the authority of the creditors; that all parties had concurred in the appointment of the bankrupt to receive the rents, which he had continued to do for five or six years; that the estate in question originally belonged to the bankrupt's wife, and that her present claim to it was now the subject of a suit in Chancery; that the reason why *Worthington* gave counter-notices to the tenants was, that he understood that they meant to replevy if the assignees distrained for the rents, and that he would thereby have been exposed to litigation and expense. The respondent, moreover, charged the petitioner with having fraudulently purchased a part of the bankrupt's estate.

The bankrupt had obtained his certificate, and his estate had paid a dividend of 3*s.* 3*d.* in the pound.

Mr. *Bacon* appeared in support of the petition.

Mr. *Swanston*, and Mr. *Tennant*, *contra*.

Mr. *Bacon*, in reply, pressed for an inquiry, as the facts were contradicted; and there was no opportunity

1843.

Ex parte
OULTON.

1843.


Ex parte
OULTON.

now afforded, of answering the charge brought against the petitioner, of the fraudulent purchase of the bankrupt's property. He applied also for permission to be granted to the petitioner, to use the name of his co-assignee in any proceeding by ejectment, or otherwise, against the bankrupt for the recovery of the estate.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Let it be referred to the Commissioner, to inquire what is the nature and extent of the right and interest of the bankrupt in right of his wife to the estate in question, under the will of *James Newton*, and under what circumstances such right remained unsold, or unconverted; and let the Commissioner ascertain under what circumstances the bankrupt had been continued in the receipt of the rents, or of the property of *James Newton*, in which the assignees have any interest, and inquire whether the bankrupt had properly accounted for the monies so received by him. Let the Commissioner also take an account of the rents received by the assignees, or either of them, or what they, or either of them, might have received; and report in what state the Chancery suit alluded to in these proceedings now is, and what course therein will be best for the benefit of the estate, and state any other circumstances which he may think material as to the property of *James Newton*. Let the Commissioner also state under what circumstances the notice of the 6th of May 1843 was given, and whether any loss was occasioned thereby; and inquire whether any, and what, part of the bankrupt's property has been purchased by the petitioner on his own account, or otherwise, and under what circumstances, and whether any course is proper to be taken against the petitioner to annul such

purchase. Let the Commissioner also state, whether in his opinion it will be advisable to remove both, or either of the assignees; with liberty to take any immediate steps for the protection of the property, and the receipt of the rents of the estate of *James Newton*. The rest of the petition to stand over, and costs to be reserved.

1843.

Ex parte
OULTON.

Ex parte —

Lincoln's Inn,
July 24.

THIS was the petition of a mortgagee for liberty to bid at the sale of the mortgaged property, and that the costs of this application might come out of the proceeds of the sale.

The costs of an application of a mortgagee, for leave to bid at the sale, will not be allowed out of the proceeds, unless the assignees consent.

Mr. *Rogers*, in support of the petition, cited *Ex parte Say* (a), and *Ex parte Berkeley* (b).

VICE-CHANCELLOR KNIGHT BRUCE, C.J.—If you will put your application in a definite form, that is, if the assignees will inform me that this petition is presented at their request, I will make the Order as to the costs, but not otherwise; for I cannot give away the bankrupt's estate.

(a) 1 Deac. & C. 32. In this case, however, the assignees appeared on the petition, and did not oppose the application for costs.

(b) 2 M. & A. 54; 4 Deac. & C. 572.

1843.

Lincoln's Inn,
July 24.

A lessor is entitled, under the 6 Geo. 4. c. 16. s. 75., to an Order on the assignees to elect, whether they will accept or decline a lease, notwithstanding the lease is in the hands of a third person, with whom it was deposited by the bankrupt by way of equitable mortgage.

Ex parte VARDY.—In the matter of BUTT.—

THIS was the petition of the lessor of a lease granted to the bankrupt, praying that the assignees might be ordered to elect, whether they would accept or reject it. It appeared that the lease was not in the possession of the assignees, but in the hands of a Mr. Crewe, with whom the bankrupt had deposited it by way of equitable mortgage.

Mr. Lush, in support of the petition, cited *Ex parte Fletcher (a)*, where an Order was made for the sale of leasehold property, on the petition of an equitable mortgagee with whom the lease was deposited, notwithstanding the assignees declined to make their election whether they would accept or reject the lease.

Mr. Dixon, for the assignees, said that they were not prepared to elect, as the lease was not in their possession, but in that of a third party, namely, the equitable mortgagee.

Mr. Swanston appeared on behalf of the equitable mortgagee.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I was at first doubtful, whether the 75th section of the 6 Geo. 4. c. 16. applied to a case, where the lease was in the possession of an equitable mortgagee. But I find, that in a more apposite and prior case to the one cited, which occurred on the parallel enactment of the 49 Geo. 3

(a) 1 Deac. & C. 356.

c. 121. s. 19., and was decided by Sir *Thomas Plumer*,—
I mean the case of *Ex parte Clunes (a)*,—it was held, on
a petition by the landlord to compel the assignees to
deliver up a lease, which had been deposited by the
bankrupt with a third person as a security for a debt,
that such an Order could properly be made upon the
assignees; for that, though the statute did not, in words,
extend to cases where the lease was in the hands of a
third person, yet by an equitable construction of the
enactment, which was intended for the benefit of land-
lords, the Lord Chancellor had jurisdiction to make the
Order. There is so much good sense in that decision,
that I shall entirely follow it on the present occasion. I
think the landlord cannot proceed against the equitable
mortgagee. Let the assignees, therefore, on or before
Thursday next, elect whether they will accept or decline
the lease, and give notice to the solicitor for the petitioner,
if they elect to accept it; but in case they omit to give
such notice, then let the Order be, that they shall be
taken to have declined the lease. And let the equitable
mortgagee have his costs of his appearance on this pe-
tition.

1843.

Ex parte
VARDY.

(a) 1 Madd. 76.

Ex parte ABEL SMITH and others.—In the matter of

PETER WILLIAMS and CHARLES MOTTRAM.—

Lincoln's Inn,
July 27 and 29.

THIS was the petition of the assignees and certain
creditors, praying that the debt of *Smith & Co.* might

A petitioning
creditor had
sold the bank-
rupt goods, in

payment for which he took three bills of exchange accepted by the bankrupt, which the cre-
ditor negotiated, and which were not in his hands, nor due, at the time he issued the fiat.
The Commissioner expunged the proof of his debt, on the ground that the bills were not in
his possession at the time of the bankruptcy. *Held*, that an Order might be made, under
the 18th section of the 6 Geo. 4. c. 16., for the substitution of the debt of another creditor.

1843.
~~~~~  
Ex parte  
SMITH  
and others.

be substituted, in the room of the petitioning creditors' debt, which had been declared insufficient to support the fiat.

The fiat issued on the 16th November 1841, upon the petition of *Adam Brierley*; and the adjudication was grounded upon a deposition, that the sum of 100*l.* was due to him from the bankrupts for goods sold and delivered on the 1st September 1841. On the 4th January 1842, *Brierley* proved a debt under the fiat for 199*l.* 10*s.* for goods sold and delivered, exhibiting, as securities for the same, two bills of exchange, accepted by the bankrupts, for 50*l.* each, and one for 99*l.* 10*s.* On the 12th April 1843, an application was made to the Commissioner to expunge *Brierley's* proof; and the Commissioner made an order to that effect, on the ground, that the goods, which had been so sold and delivered, had been paid for by bills of exchange, and that these bills, which were not due at the time of issuing the fiat, had been negotiated by *Brierley*, and were consequently not then in his possession. The petitioners, *Smith & Co.*, had proved a debt to the amount of 7068*l.* 17*s.* 3*d.*; and it was alleged in the petition, that a sufficient part of such debt to support a fiat was incurred not anterior to the alleged debt of *Brierley*. The assignees had brought actions against two persons for large sums of money due from them to the estate of the bankrupts, in which actions the defendants had pleaded, disputing the sufficiency of the petitioning creditors' debt; and it was in consequence of these pleas, that the above investigation took place before the Commissioner as to the sufficiency of the debt.

The assignees alleged, that they were desirous of proceeding with the two pending actions, and were advised

that, upon an Order being made for the substitution of a good and valid petitioning creditors' debt, they would be enabled to do so with effect.

1843.  
  
*Ex parte*  
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 and others.

*Mr. L. Wigram*, and *Mr. Bacon*, in support of the petition. There is some question, whether the 18th section of the 6 *Geo.* 4. c. 16. applies to a case of this kind, so far as rendering it obligatory that the debt proposed to be substituted shall have been incurred not anterior to the debt of the petitioning creditor; for here the Commissioner has decided that the petitioning creditor had no debt (a).

(a) There is some doubt, whether the decision of the learned Commissioner in this case, in holding that there was no debt, can be supported, within the enactment of the 6 *Geo.* 4. c. 16. s. 15., which provides, that "every person, who has given credit to any trader upon valuable consideration, for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition [for a commission], or join in petitioning as aforesaid, whether he shall have any security in writing, or otherwise, for such sum, or not." It is true, that in *Ex parte Botten*, Mont. & B. 412, *Sir George Rose* held, that the vendor of goods who had taken the acceptance of the vendee for the amount of the price, and had negotiated the bill, which was in the hands of a third person, and not due, at the time the fiat issued, had no good petitioning creditor's debt. But in the subsequent case of *Ex parte Magnus*, 2 Mont. Deac. & D. 604, where the petitioning creditor's debt arose under the same circumstances, *Sir John Cross* said, that, if it had not been for the authority of *Ex parte Botten*, he

should have been inclined to think, that the contingency which existed of the bill being dishonoured, and of the creditor being thereby remitted to his original debt, would have been enough to constitute that debt a sufficient foundation for a fiat, within the meaning of the act; and that, for this purpose, it was not to be considered as extinguished, but that its extinction would depend upon the ultimate payment of the bill of exchange. Now what are the facts of the above case? The petitioning creditor had given credit to the bankrupts upon valuable consideration for a sum payable at a certain time, viz. the time when the bill of exchange would fall due, which time had not arrived at the time of issuing the fiat; and he had a security in writing given to him by the bankrupt for the payment of the debt. But the act expressly declares, that a party may, under these circumstances, be a petitioning creditor, whether he shall have any such security, or not. It is true, that the creditor had in this case parted with his security; but it was sure to be returned upon his hands, if it was not discharged by the bankrupt.

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Mr. *Wright* appeared, on the part of the petitioning creditor, to oppose the application.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. — Unless you mean to appeal from the decision of the Commissioner, you have no right to be here to oppose the substitution of another debt.

Mr. *Wright* submitted, that, as the petitioning creditor had been served with the petition, he was at any rate entitled to ask for the costs of his appearance against the petitioner.

Mr. *James Russell* appeared for the bankrupt.

Mr. *Wigram*. The bankrupt has nothing to do with this application. Under the 1 & 2 *Will.* 4. c. 56. s. 17., the adjudication of the Commissioner is conclusive evidence against the bankrupt, as he has not presented a petition for its reversal, within two calendar months from the date of the adjudication.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. — I do not see that the bankrupt is estopped by the act from appearing before the Court of Review, in order to oppose this petition. But has it ever been decided, that, where there is no debt, the 18th section of the 6 *Geo.* 4. c. 16. applies, in any way, to a proceeding for the substitution of the debt. If there is any authority on the subject, I should be induced to follow it; but if none can be found, I am inclined to think that the section does not apply to a case of this description.



Mr. *Wigram*. In *Ex parte Hall* (a), the Vice-Chancellor of England decided that the 18th section was applicable to a case, not only of deficiency in the amount, but to any original defect in the nature of the debt of the petitioning creditor, upon which the commission issued.

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The CHIEF JUDGE.—That decision refers to an existing debt. Suppose, instead of issuing a fiat, the petitioning creditor had brought an action,—if a man arrests me for a debt, and I owe him nothing, there is no debt;—the issuing of a fiat, therefore, does not, any more than the issuing of a writ, constitute a debt. I should wish, however, to know more accurately the circumstances of the case; if there was some debt existing at the time of suing out the fiat, then the application may be granted; but, if there is no foundation whatever for a debt, I cannot make the Order.

Mr. *Bacon*. The sale of the goods by the petitioning creditor to the bankrupt took place on the 1st of September 1841. The day when the outstanding bill became due, which was given in payment for the goods, cannot be said to be the date of the contracting of the debt.

The CHIEF JUDGE.—If there was a floating debt, then there is no doubt that the 18th section may apply. But,

(a) Mont. & Mac. 39. So in *Ex parte Smith, re Witham*, which occurred before the Vice-Chancellor of England on the 1st July 1830, a note of which was furnished to the authors by Mr. *Ayrton*, his Honour said, that the 18th section was not confined to the amount of the debt alone; and that if, on reading the affidavits, it turned out that the petitioning creditor's debt was not fictitious, the Order for substitution might be made; but not, if the debt was fictitious, as in that case it could not be ascertained whether the debt proposed to be substituted was not anterior.

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as I observe there is no allegation in the petition, that the debt proposed to be substituted was incurred not anterior to the debt of the petitioning creditor, the petition must be amended, for the purpose of introducing such an allegation; after which the question may be more fully discussed.

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Mr. *L. Wigram* said, that the petition had now been amended by the introduction of the necessary allegation, and that he was prepared also with an affidavit, that the debt proposed to be substituted was incurred not anterior to the debt of the petitioning creditor.

Mr. *J. Russell*, for the bankrupt. These orders are not made, unless the Commissioner certifies that the debt proposed to be substituted was incurred not anterior to the petitioning creditor's debt; *Ex parte Hunter* (a). It is important to the bankrupts' interests, that it should be positively ascertained by the proper authority, that the debt to be substituted was not anterior to that of the petitioning creditor. Here is a large debt stated to be due to these petitioners, which has been accruing for several years, and part of it must therefore be anterior to the debt of the petitioning creditor. The affidavit states, not that the debt proposed to be substituted was incurred not anterior to that of the petitioning creditor, but that it was incurred not anterior to the 1st September 1841.

The CHIEF JUDGE.—There may be some difficulty in substituting the debt of the petitioners, as it stands upon the proof made by them under the fiat. They have proved for a large amount, a great portion of which

(a) 2 Deac. & C. 507.

appears to have been for a debt incurred by the bankrupt anterior to that of the petitioning creditor, and some portion of it for a debt not anterior, which may bear upon the act of bankruptcy.

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Mr. *Wigram* proposed that there should be two proofs, one for the part of the debt anterior, and the other for the part not anterior.

The CHIEF JUDGE.—That perhaps may do.

Mr. *Wright*, for the petitioning creditor, said, that the affidavit of the debt stated to be due to the petitioners was made by an accountant, and not by any one of the petitioners.

The CHIEF JUDGE.—I am bound to believe the contents of the affidavit to be true, until I hear evidence to the contrary.

Mr. *Wright* then submitted, that the petitioning creditor was entitled to his costs out of the bankrupt's estate. In *Ex parte Cousins* (a), which occurred before Sir *J. Leach*, it was held, that, if upon the evidence it appeared that the commission failed through the mistake of law or of fact by the petitioning creditor, then the costs should be paid out of the estate; but, if it was proved to have been in consequence of the misconduct or fraud of the petitioning creditor, then he should pay the costs occasioned by such fraud, and of the consequent application to the Court to substitute another debt. In *Ex parte Hall* (b), also, the Order directed that the costs should be paid out of the bankrupt's estate. There are certainly some decisions the other way, viz., *Ex*

(a) 2 G. & J. 270.

(b) *Mont & M.* 43, note (a).

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parte Lloyd (a), and *Ex parte Hayne (b)*. But it is submitted, that the two cases decided by Sir *Thomas Plumer* and Sir *J. Leach* are of greater authority than the two last cited cases; and that as, in the present instance, the petitioning creditor has been guilty of no fraud or misconduct, he ought to have his costs.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I shall make an Order under the 18th section for the substitution as to 300*L.*, part of the debt proved by the petitioners, which accrued due since the 1st of September, 1841; and there will be no Order as to the costs of the petitioning creditor.

August 5. The matter was spoken to again this day before his Honour on the minutes, and as to the question of costs.

Mr. *J. Russell*. The bills that were given by the bankrupt to the petitioning creditor for the goods purchased by him on the 1st September 1841, were not due, until after the debt proposed to be substituted was contracted by the bankrupt with the petitioners; it therefore cannot be said to be not anterior to the debt of the petitioning creditor.

The CHIEF JUDGE.—The Order, as it at present stands, is my judicial decision; but you may take it without prejudice as to that point.

The Order was as follows: it is given at greater length than usual, as it was settled with some care by his Honour the Chief Judge, and has been since adopted in the office, in lieu of the form set out in *Ex parte Hall (c)*.

(a) 2 Deac. & D. 506.

(b) 4 Deac. & C. 403.

(c) 1 M. D. & D. 217.

After reciting the prayer of the petition, and the previous proceedings,—the Order went on to state, that, the petitioners undertaking to apply within a fortnight to a judge at chambers in the two pending actions in which the assignees were plaintiffs, and to abide by any Order which the said judge, or the Court of Exchequer, should make touching the premises;—and it appearing to this Court, that the said fiat was awarded and issued on the petition of the said *Adam Brierley*, and that after adjudication thereunder, and before preferring the said petition, the debt of the said *Adam Brierley*, the petitioning creditor, on which the said adjudication was made, was found to be insufficient to support the fiat, within the intent and meaning of that part of the statute of the 6 Geo. 4. c. 16. intituled, “An act to amend the laws relating to bankrupts,” whereby it is enacted, that if, after adjudication, the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid; And it appearing to this Court, that the said petitioners had proved their said debt before preferring their said petition, and that their said debt, or a part thereof, was sufficient to support a fiat against the said bankrupts, and that their said debt, or a part thereof sufficient to support the said fiat, was incurred not anterior to the said debt of the said *Adam Brierley*; This Court doth order, that the said fiat be

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proceeded in ; and that the costs of the petitioners and of the bankrupts, occasioned by this application be paid to them respectively out of the estate of the said bankrupts, being first taxed by the Commissioner of her Majesty's Court of Bankruptcy, acting in the prosecution of the said fiat, or by *D. H. Richardson, Esq.* one of the deputy registrars of the Court of Bankruptcy. And it is declared that this Order is made in respect of the sum of 300*l.*, part of the said debt of the petitioners,—which said sum of 300*l.* is declared to have accrued due not anterior to the said debt of the said *A. Brierley*, and not anterior to the 1st day of September 1841,—and not in respect of any other part of their said debt. But this Order is to be without prejudice to the right of proof (if any) of the petitioners for any other or larger sum of money, and also without prejudice to the right, if any, of the bankrupt *Charles Mottram* to dispute or question the validity of the said fiat.

Ex parte THOMAS OVINGTON HARRISON and JOHN CROFTON.—In the matter of THOMAS GALES, WILLIAM JOHN GUEST, JOHN FORSTER NAISBY, and MATTHEW KIRTLEY.—

Lincoln's Inn,
July 28 & 29.

A. agreed to sell to *B.* for 4000*l.* a ship employed on a

THIS was the petition of creditors claiming to prove for a balance of 1166*l.*, under the following circumstances.

distant voyage, when she should arrive at her port of discharge in the United Kingdom ; and *B.* agreed, within one month after her arrival, or within such further time as should be necessary for effecting the repairs and discharging the cargo, on the execution of a bill of sale of the vessel, to deliver to *A.* two promissory notes for the amount of the purchase-money ; in default of which, *A.* might sell the ship, and keep the proceeds in part of the purchase-money, *B.* undertaking to pay to *A.* any deficiency, within one calendar month after such sale ; and in case the vessel should be lost, the agreement was to be void. On the 27th March the ship arrived, before which time *B.* became bankrupt. On the 31st March *A.* gave notice of her arrival to the assignees, who declined to complete the contract ; and *A.* sold the ship for 2833*l.* Held, that this agreement amounted to a contract on the part of *B.* to pay a certain sum on a contingency, liable to be reduced on another contingency ; and that *A.* could prove for the balance of the 4000*l.*, after deducting the amount of the proceeds of the sale of the ship.

By articles of agreement dated the 11th January 1842, and made between *T. O. Harrison* of the one part, and the bankrupt, *Thomas Gales*, of the other part, reciting that the said *T. O. Harrison*, who was then the owner of the vessel called the *Salsette*, of the port of London, then or late on her passage from Port Louis in the Mauritius bound to New York in North America, or engaged in the Indian Seas or elsewhere, as the case might be, it was witnessed, that the said *T. O. Harrison* did thereby agree to sell to the said *Thomas Gales*, and the said *Thomas Gales* did thereby agree to purchase of the said *T. O. Harrison*, the said vessel with her appurtenances, when she should arrive at her port of discharge in the United Kingdom of Great Britain, Ireland and Scotland, for the sum of 4000*l.*, to be paid at the times and in manner thereafter mentioned; the said ship or vessel to be delivered to the said *Thomas Gales* or his assigns, at the costs and expenses of the said *T. O. Harrison*, or his underwriters, protected from and against all such average damage or loss by perils of the sea, fire or other perils, as were then insured against by the said *T. O. Harrison*, and recoverable from the underwriters of and upon the said vessel, within one calendar month after she should so arrive in the united kingdom as aforesaid, or within such further time as from the expiration of the said month should be necessary for repairing such average damage or loss and discharging her cargo. And for the consideration aforesaid, the said *Thomas Gales* did thereby agree with the said *T. O. Harrison*, his executors, administrators and assigns, that he, the said *Thomas Gales*, would, within one month after the arrival of the said vessel in the united kingdom, or within such further time as should

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be reasonably necessary for effecting the repairs and discharge of her cargo as aforesaid, in case the same should be made, and on the execution of a bill or bills of sale of the said vessel by the said *T. O. Harrison*, or his assigns, or attorney or attornies thereunto lawfully authorized, or his executors, or administrators, to the said *Thomas Gales*, his executors, administrators or assigns, or as he or they should direct, in case the same should be required, and duly tendered for execution by him or them, deliver to the said *T. O. Harrison*, his attorney or attornies, agent or agents, for this purpose authorized, or his or their executors, administrators or assigns, joint and several promissory notes of the said *Thomas Gales*, or such other person and persons, as the said *T. O. Harrison*, or his attorney or attornies, agent or agents, executors or administrators, should approve, payable at some banking house in London to the said *T. O. Harrison*, his executors or administrators, or his or their order, or as he or they should direct, authorize, or require; the one of such notes being for the sum of 2000*l.*, payable on the 10th October then next, and the other of such notes being payable on the 10th January then next for the further sum of 2000*l.*; but that in case the said *Thomas Gales* should omit to deliver to the said *T. O. Harrison*, his attorney or attornies, agent or agents, for that purpose authorized, or his or their executors, administrators or assigns, within the time aforesaid, the said promissory notes, it should be lawful for the said *T. O. Harrison*, his executors, administrators or assigns, to sell and dispose of the said ship or vessel, with all her materials and appurtenances, by public auction or private contract, for the best price or sum of money that could be reasonably gotten for the same, and to receive and keep such sum, in part payment of the

costs and expenses incident to such sale, and subject thereto, in payment of the said purchase money, so far as the same would thereto extend; and that the said *Thomas Gales*, his executors or administrators, would pay or cause to be paid unto the said *T. O. Harrison*, his executors or administrators, within one calendar month after such sale, so much money as should be necessary for making up and paying the full sum of 4000*l.*; and that, upon such sale or sales of the said vessel, the same should be deemed to be with the privity of the said *Thomas Gales*, and in discharge of the obligation on the part of the said *T. O. Harrison*, his executors or administrators, to convey the same to the said *Thomas Gales*, his executors or administrators, as thereinbefore mentioned. And for the considerations aforesaid, the said *T. O. Harrison*, did thereby, for himself, his executors and administrators, promise and agree with the said *Thomas Gales*, his executors, administrators and assigns, that, on the delivery to the said *T. O. Harrison*, his executors or administrators, or his or their attorney or attornies, agent or agents, of such two promissory notes as aforesaid, within the time thereinbefore mentioned for that purpose, he, the said *T. O. Harrison*, his executors, administrators or assigns, would, at the expense of the said *Thomas Gales*, his executors or administrators, within one calendar month, or such further time as thereinbefore mentioned, after the arrival of the said vessel at the port of discharge in the united kingdom, well and truly convey the said vessel, with the appurtenances thereto belonging, unto the said *Thomas Gales*, his administrators or assigns, and as he or they should direct; and also would, within the time aforesaid, repair or cause to be repaired all such loss or damage by perils of the sea or other perils as were then insured against and recoverable by

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the said *T. O. Harrison*, or his assigns, from the underwriters of and upon the said vessel. Provided that nothing therein contained should prevent the said *T. O. Harrison* from receiving all benefit or advantage to be derived from the use and navigation of the said vessel until her arrival in the aforesaid kingdom, in the ordinary course of the employ of a vessel of her description; and that in case she should be lost, and thereby prevented arriving in the said united kingdom, that agreement should be void. And for the performance of the said agreement on the respective parts of the parties thereto, each of them thereby bound himself, his executors and administrators, unto the other of them, his executors, administrators and assigns, in the penal sum of 2000*l*.

In February 1842 *T. O. Harrison*, being about to sail for India, executed a certain indenture dated the 1st February 1842, whereby he assigned to the petitioners all his interest in the above-mentioned vessel, called the *Salsette*, upon trust to fulfil all the stipulations entered into by him in the above articles of agreement. And by a power of attorney, dated the 3rd February 1842, he appointed the petitioners jointly and severally his attornies to execute a proper bill of sale of the ship to the bankrupt *Thomas Gales*, and in all other respects to act as his attornies in the performance and execution of all matters contained in the above agreement.

On the 12th February 1842 a joint fiat issued against *Thomas Gales*, and the other bankrupts above-named, trading under the firm of *Thomas Gales & Co*.

On the 27th March 1842 the vessel arrived in the port of London; and on the 31st March 1842 notice of her arrival was given by the solicitor of the petitioners to the bankrupt *Gales*, and the assignees of his separate estate, who declined to complete the contract on the

part of the bankrupt *Gales*; and on the 9th May following a further notice was given, that the petitioners were ready to perform the contract on the part of the said *T. O. Harrison*.

On the 24th of May 1842 the ship was put up to sale by auction, but not then sold; but the petitioners afterwards sold her by private contract for the sum of 2833*l.* 10*s.* 8*d.*

On the 6th February 1843 the petitioners applied to prove against the separate estate of *Gales* for the sum of 1166*l.* 9*s.* 4*d.*, being the balance due to *T. O. Harrison* upon the above contract, after deducting from the 4000*l.* the sum of 2833*l.* 10*s.* 8*d.*, for the net proceeds received by them from the sale of the ship; but the Commissioner rejected the proof.

Mr. Bacon, in support of the petition. As this application is to be opposed, on the ground that the claim of the petitioners is merely for contingent damages, the amount of which cannot be settled without the intervention of a jury,—and as some cases may be cited by the other side in support of that proposition, it will be proper to show in what respect those cases differ from the present. It is true, that in *Boorman v. Nash* (a), where a person, who had contracted for a certain quantity of oil, to be delivered to him at a future day at a certain price, became bankrupt before that day arrived, it was held, that the vendor could not prove the amount of the price under the commission. But the grounds on which that case was decided are clearly stated in Lord *Tenterden's* judgment, namely, that, at the time when the commission issued, it was uncertain not only what amount of damage, but whether any damage would be

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sustained; for the amount of the damage could only be ascertained by the state of the market at a future day, that is, by the difference between the price which the defendant contracted to pay, and that which could only be obtained for the oil on the days when the contract ought to have been completed. The subsequent case of *Green v. Bicknell* (a) was, like the one just cited, also a contract to purchase oil by a party who afterwards became bankrupt; and the only distinction drawn by Lord Denman in his judgment between the two cases is, that in *Boorman v. Nash*, the breach of contract by the bankrupt did not take place until after the bankruptcy, while in the case last cited it took place before; but the intervention of a jury was held equally necessary for the ascertainment of the claim; as every one of the data, which formed the basis of the calculation, might be denied and disputed, and was the subject of opinion, rather than direct decision of facts. But the case of *Ex parte Moffatt* (b), which was decided by the Court of Review, and afterwards confirmed on appeal by the Lord Chancellor, is much more like the present case. There the bankrupt had agreed to purchase a quantity of tea, the time for payment of which did not occur until after his bankruptcy. It appeared that, by the custom of the tea trade, when teas were sold at a given prompt, or future day of payment, the buyer paid a deposit as part of the purchase money, and the vendor retained the teas, or the warrants representing them, until the day of prompt, when, if he failed to pay the balance of the purchase money, the vendor was at liberty to resell the teas, and to charge the purchaser with any deficiency, together with interest from the prompt day; and it was held, that, as the assignees had refused to take the teas,

(a) 8 Adol. & E. 701.

(b) 1 Mont. Desc. & D. 282; 2 Id. 170.

or pay the balance of the purchase money, the vendor might resell them, and prove for the amount of the deficiency. And when the case came before the Lord Chancellor, on appeal, his Lordship also held, that the claim of the vendors constituted, not unliquidated damages, but a proveable debt. Now, the intervention of a jury, which will no doubt be much relied upon in the present case, was quite as necessary in that, for the ascertainment of the damages. The special contract between the parties in this case takes the place of the custom of the trade in *Ex parte Moffatt*, and enables the Court to determine the amount of the damages, without any intervention of a jury.

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Mr. J. Russell, *contrà*. The case of *Ex parte Moffatt* proceeded on the ground that there was no breach of contract, and that the bankrupt had accepted the teas, and that there was a new contract between the parties; on that ground alone the case was decided, [The Chief Judge. In *Moffatt's* case, the goods had never left the possession of the vendor.] The Lord Chancellor in that case says, "It is not necessary that there should be an actual transportation of the goods, to constitute an acceptance; and the fact of the goods being left, as stated in this case, amounts not only to an acceptance, but to a new contract by way of pledge. The transaction being, therefore, according to the terms of the special case, a purchase, and the bankrupt becoming the owner of the teas, and the vendor the owner of the money, there was no difficulty in ascertaining the debt; and all that remained to be ascertained, was what usually remains to be ascertained where there is a pledge, namely, the amount of the reduction to be made in respect of the security." The decision there depended entirely

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on the facts, that the bankrupt had accepted the teas, and that he was the owner of the teas. Now, in the present case, if no bankruptcy had taken place, it is uncertain whether any claim could arise. Moreover, the agreement to sell the ship can have no operation in law; for it does not recite the certificate of registry. By 3 & 4 Will. 4. c. 55. s. 31., it is declared, that where the property in any ship shall be sold, it must be transferred by bill of sale, containing a recital of the certificate of registry; otherwise the transfer shall be of no effect.

VICE-CHANCELLOR KNIGHT BRUCE, C.J.—That point has already struck me as being of some importance in his case; and, as the determination of it may render the other question unnecessary, I should wish it to be argued first. The further hearing of the case, therefore, had better stand over till to-morrow, to enable Mr. Bacon to prepare himself on that question.

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Mr. Bacon. There is a great difference between the wording of the last Register Act on this subject, and the former act of 34 Geo. 3. c. 68. s. 14., which declared not only, that no *actual transfer* of the property in any ship should be valid or effectual, unless it recited the certificate of registry, but also that no *contract or agreement* for transfer should be valid, unless it contained such recital. But by the subsequent act of 6 Geo. 4. c. 110. s. 31., and the 3 & 4 Will. 4. c. 55. s. 31., the necessity of reciting the certificate of registry only arises, where there is an *actual transfer* of the ship; for it is provided, that where the ship "shall be sold," only, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of

registry, or the principal contents thereof. And in *Abbott on Shipping* (a), the same distinction is noticed between this and the former enactments; for it is there said, that a recital of the certificate of registry is not now made necessary to the validity of an *executory* contract or agreement for the transfer of the ship, as was expressly required by the 34 *Geo. 3. c. 68. s. 14.* And it is further observed by the author (b) that, by the 6 *Geo. 4. c. 110.*, it was sufficient to recite even in the bill of sale the principal contents of the certificate of registry, and that the instrument was not to be deemed void for any error in the recital, if the identity of the ship therein intended be effectually proved thereby. [The *Chief Judge.* The agreement here mentions the ship with sufficient particularity, though it does not notice at all the certificate of registry.] The enactment of the last Register Act, the 3 & 4 *Will. 4. c. 55. s. 31.*, is in the same words as that of the 6 *Geo. 4. c. 110*; for it is enacted "that where and so often as the property in any ship or vessel, belonging to any of his Majesty's subjects, shall, after registry thereof, be sold to any other or others of his Majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof; otherwise such transfer shall not be valid or effectual, &c." Therefore, as the words in the last act do not notice any *agreement* for transfer, and the learned text writer gives it as his opinion, that the words in the previous statute of the 34 *Geo. 3. c. 68.* were purposely omitted in the subsequent act, we submit, that the certificate of registry need not now be recited in a mere *agreement* to transfer.

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(a) Page 50, 5th edition.

(b) Id. page 51.

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VICE-CHANCELLOR KNIGHT BRUCE, C.J.—I think this point is proper to be decided by a court of law, if the assignees wish it; and if so, then I think the other point, first dwelt upon in the argument, may be disposed of now, and shall be, therefore, glad to hear Mr. *Russell* further upon that question.

Mr. *Russell*. The vendor in this case might have sold the ship, without any agreement for that purpose; but his claim for any damage arising from the breach of contract could only be for unliquidated damages; *Maclean v. Dunn* (a). It is true, that the deficiency arising from the proceeds of the sale of the ship would be the proper measure of damages; but, at the time of the bankruptcy, it was not known whether any sum would be due to the vendor; for it could not be then ascertained, whether he would have a right to make any claim against the bankrupt. In *Boorman v. Nash* (b), where the bankrupt had contracted for a certain quantity of oil, to be delivered to him at a future day, and where the price could be fixed with greater certainty than in this case, it was held that there was no debt. You must show that there was some debt, or you cannot put any value upon it. Here the sum was not so fixed, as in *Boorman v. Nash*; for the sale of the ship might be delayed to an uncertain period, depending as it did upon two contingencies, the arrival of the ship at an English port, and the delivery by the bankrupt of the promissory notes. [The Chief Judge. In *Boorman v. Nash* there were no specified goods, which were the subject of the contract.] The quantity of the oil was specified, as well

(a) 4 Bing. 722.

(b) 9 B. & C. 145. And see note to *Ex parte Simpson*, 3 Deac. & C. 802.

as the price; and yet it was held, that when the commission issued, it was uncertain not only what amount of damage, but whether any damage would be sustained. The argument of Mr. Baron *Alderson* (as counsel in that case) applies to the present, where he says, that, "as to the proof after the happening of the contingency, that merely applies to such debts, payable on a contingency, as are mentioned in the first branch of the section of the statute, and not to a case where it is uncertain whether any damage will ever be sustained." *Green v. Bicknell* (a) is even a stronger case in favour of the position contended for; for there the claim of the vendor could be measured by the difference between the contract and the market price, at the time when the bankrupt should have fulfilled his contract. How could the petitioners in the present case, at the time of the bankruptcy, predicate that any sum would ever be due to them?

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I am of opinion, that an action of debt could be maintained on this contract, which was to pay a certain specified sum, subject to an uncertain reduction, depending upon the amount of the proceeds of the sale of the ship. In the present case, a man, for a valuable consideration, contracts to pay a certain sum of 4000*l.* on a contingency, liable to be reduced on another contingency. The party becomes bankrupt. The first contingency, on which depended the payment of the specified sum, happens after the bankruptcy, and then the contingency for the reduction of the sum. And the question now is, whether the petitioners, with whom the bankrupt so contracted, cannot prove for the balance due to them. I think that

(a) 8 Adol. & E. 701.

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the petitioners have a right to prove for such balance; the amount of which, it appears, is not in dispute between the parties. Upon the question as to the invalidity of the contract, by the omission to recite the certificate of registry in the agreement, I give no opinion. It seems to me a fit point for the decision of a Court of law; and if the assignees like to try the legal question, they are at liberty to do so, by bringing an action, if they shall be so advised. They had therefore better consider the matter, and decide whether they will take that course, or go to the Lord Chancellor on a special case. Unless an action is asked for, I shall direct a proof for the 1100*l*.

August 6.

Mr. *Russell* now intimated to the Court that the assignees declined trying the question at law.

The CHIEF JUDGE therefore made the Order as above, but directed that there should be no costs on either side, as the petition was substantially an appeal from the decision of the Commissioner.



Lincoln's Inn,
July 31.

Quere, whether a Commissioner of the Court of Bankruptcy is bound to obey an Order of reference of the Court of Review. But see post, *Ex parte Blake*.

Ex parte CURLEWIS.—In the matter of CURLEWIS.—

IN this case an Order had been made by the late Sir *J. Cross*, referring it to the Commissioner, Mr. *Fane*, to take an account between the petitioning creditor and the bankrupt, for the purpose of ascertaining whether there was a sufficient debt to sustain the fiat. Upon this reference the Commissioner declined to act; and, upon a subsequent application to the Court it was, without the express consent of both parties, referred to the registrar,

who had accordingly entered on the inquiry, and had reported that there was not a sufficient debt.

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Mr. *J. Russell*, and Mr. *Beale*, in support of the petition, now applied that the fiat might be annulled, in pursuance of the registrar's report.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Is there any authority for sending a reference of this nature to any person except the Commissioner? The objection may be fatal to the whole proceedings; but if it be so, I cannot help it, as I am bound to administer the law; and if this duty does not in truth belong to the office of Commissioner, the legislature must probably interfere, and make some provision for its performance. It appears to me, that this Court has no right to call upon the registrar to do what does not belong to his functions. If requisite, the parties must take the opinion of the Lord Chancellor on the case; for I can only say, that, if the duties to be performed on any Order of reference from this Court are to be declared to be the exclusive duties of the registrar, it must be so declared by the Lord Chancellor, and not by me.

After a short statement of facts at the bar, it appeared that, subsequently to the second reference, an application to the Court had been made by the respondent in the matter of the reference.

His Honour then observed, that, possibly, that application might be taken to amount to a consent to refer the matter to the registrar. My attention has been called to the 6th section of the 3 & 4 Will. 4. c. 47., by which it is declared to be lawful for the Court of Review

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to direct any one or more of the registrars, or deputy registrars, to attend any one of the judges of the Court in the discharge of *their duties under that act*, and to give such attendance and perform *such duties* (a), as the Court of Review may, by any Order, direct. This clause may, possibly, have been thought sufficient authority for a reference to the registrar. As the present case, however, shows something equivalent to a consent, and the registrar has gone into the whole of the matter, I think it is right, on the production of an affidavit of service of notice of this application, to direct the fiat to be annulled, at the costs of the petitioning creditor. (b)

(a) The above words in italics seem to limit the power of the Court of Review to direct the registrar to perform any fresh duties, except those specified by that act; which was passed for the express purpose of enabling some one, or more, of the judges of the Court of Review to discharge part of the duties vested in the Commissioners of the Insolvent Court. The first six sections of the act relate to those duties alone; and the 8th, which imposes a new duty upon the registrar, confines that duty to the taxation of costs, which, by the 1 & 2 Will. 4. c. 56. s. 5., were directed to be taxed by a Master in Chancery.—E. F. D.

(b) See *Ex parte Bradstock*, 2 Mont. & A. 593; 1 Deac. 691. *Ex parte Rolfe*, 3 Mont. & A. 305; 2 Deac. 421.

Ex parte ROBERT BURTON and others.—In the matter of ANTHONY GEORGE WRIGHT BIDDULPH, JOHN WRIGHT, HENRY ROBINSON, and EDMUND WILLIAM JERNINGHAM, bankrupts.—

Lincoln's Inn,
July 31.

A trustee under a will permits the trust fund, as the

monies are from time to time realized, to be paid into the hands of certain bankers, who have knowledge of the trusts. One of the partners, without the assent of the trustee, deals with a portion of the fund, by investing it on mortgage. Held, that the bankers were not jointly and separately liable in the character of trustees, but that they only incurred a liability as between banker and customer; and that, on the bankruptcy of the bankers, the trustee could only prove against their joint estate, for such balance as was in their hands at the time of the bankruptcy.

Semble, that the sum laid out on mortgage must be considered as in their hands at the time of the bankruptcy; although the mortgage itself might enure for the benefit of the *cestui que trust*.

THIS was a petition by the executors of a surviving trustee for the sale of a security, and to prove against

the joint and separate estates of the bankrupts for any deficiency.

The petition stated, that, by the last will of *Anthony Wright*, bearing date the 12th August 1785, he appointed his two brothers, *Francis Wright* and *Thomas Wright*, and *Edmond Plowden*, and *Michael Blount*, all of whom were severally since deceased, his sole executors. And, after bequeathing divers specific and pecuniary legacies, the testator gave and bequeathed all the rest, residue and remainder of his personal estate, whatsoever and wheresoever, unto the said *F. Wright*, *T. Wright*, *E. Plowden*, and *M. Blount*, their executors, administrators and assigns, upon trust to invest the same in manner therein mentioned, upon freehold or copyhold lands of inheritance in England. And he directed, that the yearly interest arising from his said residuary personal estate, (subject, nevertheless, to the payment of certain small annuities therein mentioned, which had since, by the death of the several annuitants, ceased to be payable), should be paid and applied by his said trustees in manner therein mentioned, for the benefit of his then only son, the bankrupt, *Anthony George Wright Biddulph*, (then and therein described as *Anthony George Wright*), during his life; with remainder to such son of the said *A. G. W. Biddulph*, who should first attain his age of twenty-one years; and for default of such issue, for the absolute use and benefit of such son of the said testator's body thereafter to be born, who should first attain his age of twenty-one years; with divers limitations over in default of such issue.

The testator died in April 1786, without having revoked or altered his said will, leaving the said *A. G. W. Biddulph*, and the bankrupt, *John Wright*, the testator's

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only other son, him surviving. *E. Plowden* survived the three other executors; and became the sole surviving executor and trustee of the will of the said *A. Wright*.

The petition then alleged, that after the decease of the said *A. Wright*, up to the issuing of the fiat against the above bankrupts, a banking business was carried on at Henrietta Street by divers persons, under the style and firm of *Wright & Co.*, and that during the whole of such period, the persons from time to time constituting the said firm continued to be, and were, the bankers of the executors and trustees of the said *A. Wright*, deceased, and as such bankers, received and held such part of the residuary estate of the said *A. Wright*, as from time to time was reduced into or consisted of ready money; and that the bankers were cognizant of the fact, that the said monies were such trust monies as aforesaid, and subject to the trusts of the will of the said *A. Wright*. That from April 1834 to the issuing of the fiat, the said *A. G. W. Biddulph*, *J. Wright*, *H. Robinson*, and *E. W. Jerningham*, were partners in the said firm of *Wright & Co.*

That in May 1834, the sum of 7000*l.*, part of the residuary estate of *A. Wright*, and which had theretofore been invested upon a mortgage of certain freehold lands in the county of Oxford, the property of *Charles Butler*, Esq., since deceased, was paid by the executors of *Charles Butler* into the said bank, to the account of the executors of *A. Wright*; and the said sum of 7000*l.* was thereupon duly received by the partners in the said firm, and was entered in the books of the firm on the credit side of an account kept in the same books between the executors and trustees of *A. Wright*, and the said firm of *Wright & Co.*; and that all the partners in the

firm were well aware that the said sum of 7000*l.* was subject to the trusts of the will of *A. Wright*.

That on the 8th May 1834, notwithstanding the trusts of the said will of *A. Wright*, and without the knowledge or consent of the said *E. Plowden*, the bankrupts, *J. Wright* and *E. W. Jerningham*, with the full knowledge and privity of the other bankrupts, *A. G. W. Biddulph* and *H. Robinson*, took upon themselves to lay out and invest the said sum of 7000*l.*, together with other sums amounting together to the sum of 15,000*l.*, upon the security of a mortgage or charge upon the Stort Navigation and Hertford Union Canal, which was an insufficient and improper security, and not authorized by the trusts of the said will. That upon the occasion of such advance, a certain indenture, bearing date the 8th May 1834, was made and executed between Sir *George Duckett*, of John Street, Berkeley Square, in the county of Middlesex, baronet, and Dame *Isabella*, his wife, of the one part, and the said *J. Wright* and *E. W. Jerningham*, the said Sir *G. Duckett*, and one *Francis Giles*, of the other part, whereby, after reciting that by certain indentures of lease and release, all the undertaking of the navigation of the River Stort, in the counties of Hertford and Essex, had been conveyed and assigned unto and to the use of or in trust for the said *J. Wright*, *E. W. Jerningham*, Sir *G. Duckett*, and *F. Giles*, their heirs, executors, administrators and assigns, subject to two several mortgages thereof made, the one to *Richard Hanbury Gurney*, Esq. for securing the sum of 40,000*l.* with interest at 4 per cent. per annum, and the other to *William Yatman*, Esq., for securing the sum of 5000*l.*, with interest at 4½ per cent. per annum; and

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after further reciting that by certain other indentures of lease and release all the undertaking, called the Stort and Union Canal, had been conveyed and assigned unto and to the use of or in trust for the said *J. Wright, E. W. Jerningham, Sir G. Duckett, and F. Giles*, their heirs, executors, administrators and assigns, as joint tenants, subject nevertheless to a mortgage thereof to the said *W. Yatman* for further securing to him the said sum of 5000*l.*, together with further sums amounting therewith to the sum of 6723*l.* 13*s.* 10*d.*, with interest after the rate of 4*l.* 10*s.* per cent. per annum; and after further reciting that, in the said several indentures of release thereinbefore recited, the several conveyances so thereby made to the said *J. Wright, E. W. Jerningham, Sir G. Duckett, and F. Giles*, as aforesaid, were represented to have been made in consideration of certain sums (amounting together to the sum of 17,200*l.*) paid by the said *J. Wright, E. W. Jerningham, Sir G. Duckett and F. Giles*, as the purchase-money of the said several hereditaments; and that the said sum of 17,200*l.*, together with a sum of 800*l.*, which had been expended in and about the said several conveyances, making in the whole the sum of 18,000*l.*, had in fact been so advanced and paid by *J. Wright, and E. W. Jerningham, and the said F. Giles*, in the proportions therein mentioned, that is to say, the sum of 3000*l.*, part of the said sum of 18,000*l.*, by the said *F. Giles*, upon interest at the rate of 5 per cent. per annum, and the sum of 15,000*l.*, the residue of the said sum of 18,000*l.*, by the said *J. Wright and E. W. Jerningham*, upon interest at the rate of 4½ per cent. per annum. And after further reciting, that it had been agreed that *F. Giles* should have priority over the said *J. Wright and E. W. Jerningham*, in payment



of the said sum and interest; it was *witnessed*, that the said *J. Wright, E. W. Jerningham, Sir G. Duckett and F. Giles*, their executors, administrators and assigns, should stand seised and possessed of and interested in all and singular the said several hereditaments and premises, upon trust from time to time to receive the rates, tolls, duties, rents, issues and annual profits arising therefrom, as and when the same should become due and payable, and to apply the same, in the first place, in payment to the said *R. H. Gurney and W. Yatman* respectively, of the interest due and to become due upon their said respective mortgage securities; and in the next place, to pay or retain to the said *F. Giles, J. Wright and E. W. Jerningham* respectively, their respective executors, administrators or assigns, interest on the said several sums of 3000*l.* and 15,000*l.*, so advanced by them respectively as aforesaid, at the several rates of 5 per cent. and 4*l.* 10*s.* per cent. per annum, and according to the priority so agreed on as aforesaid, at the times and in the manner therein mentioned, and subject thereto upon certain other trusts therein mentioned. And it was further agreed, that when and so often as there should be a disposable surplus of the said rates, tolls, duties rents and annual profits, the said *J. Wright, E. W. Jerningham, Sir G. Duckett and F. Giles*, their heirs, executors, administrators and assigns, should lay out and invest the whole of such disposable surplus in their or his names or name in some or one of the parliamentary stocks or public funds of Great Britain, or upon government or real security in England or Wales, to accumulate at compound interest, upon trust to apply the said stocks, funds and securities, and the accumulations thereof, in the discharge and liquidation of the said several debts of

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40,000*l.*, 5800*l.* (being part of the said 6723*l.* 13*s.* 10*d.*) 3000*l.* and 15,000*l.*, according to their several priorities.

By a certain deed-poll, bearing date the 31st May 1836, under the hands and seals of the said *J. Wright* and *E. W. Jerningham*, after reciting the said last-mentioned indenture, and that the said *J. Wright*, *E. W. Jerningham*, Sir *G. Duckett* and *F. Giles* had, since the execution of the said last mentioned indenture, paid off or allowed the said *F. Giles* to retain the sum of 500*l.* out of the profits of the said canals, in part liquidation of the said sum of 3000*l.*, so due and owing to him, as in the same indenture in that behalf was mentioned, whereby the said sum of 3000*l.* was reduced to the sum of 2500*l.*; and after further reciting, that the said sum of 15,000*l.*, which in and by the said last-mentioned indenture was stated to be due to the said *J. Wright* and *E. W. Jerningham*, was not in fact their own proper monies, but that 7000*l.* part thereof belonged to the said *E. Plowden*, *A. G. W. Biddulph* and *J. Wright*, as trustees and executors of the will of the said *A. Wright*, deceased; It was (among other things) WITNESSED, and the said *J. Wright* and *E. W. Jerningham* did thereby jointly and severally declare, that they the said *J. Wright* and *E. W. Jerningham*, and the survivor of them, his heirs, executors, administrators and assigns should stand and be possessed of and interested in the said sum of 15,000*l.* so due and owing and secured to them under the trusts of the said indenture of the 8th May 1834, and the interest thereon, as to the sum of 7000*l.* (part of the said sum of 15,000*l.*) and the interest thereof, in trust for the said *E. Plowden*, *A. G. W. Biddulph* and *J. Wright*, as trustees and executors of the late *A. Wright*, deceased.

The petition then alleged, that the said sum of 7000*l.* was so advanced by the said banking firm; and that the indenture of the 8th May 1834, and the said deed-poll of the 31st May 1836, were respectively made and executed, without the sanction or knowledge of the said *E. Plowden*, who, at the date and execution thereof, and also at the time when the said sum of 7000*l.* was so advanced as aforesaid, was the sole surviving executor of the will of the said *A. Wright*, and without any application having been made to him on the subject of such advance.

E. Plowden died in April 1838, having by his will duly appointed the petitioners to be his sole executors, whereby the petitioners became the sole legal personal representatives of *E. Plowden*, and of *A. Wright*, deceased.

On the 17th December 1840, a fiat issued against the above bankrupts, at which time the sum of 7000*l.*, part of the residuary estate of *A. Wright*, deceased, was outstanding upon the security of the indenture of the 8th May 1834; but such security was wholly inadequate for that sum, and there was no probability of the same being paid.

The petitioners claimed to have the 7000*l.*, and such arrears of interest as aforesaid, paid to them as trustees of the will of *A. Wright*, and for that purpose to have the several hereditaments comprised in the said security (subject to the prior charges) sold, and the produce applied in payment of the 7000*l.*; and they also claimed to prove against the joint and separate estates of the bankrupts for the amount of the balance remaining unsatisfied by the proceeds of the sale.

The prayer was, that it might be referred to the Com-

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missioner to take an account of the principal money due to the petitioners, as trustees of the will of *A. Wright* deceased, in respect of the security of the 8th May 1834; that the hereditaments comprised in the security might be sold, subject to the prior charges, and that the petitioners might be at liberty to bid at the sale; that the monies to arise from the sale, after the payment of the usual costs, might be applied in payment to the petitioners of what should be so found due to them, and the surplus paid over to the assignees; and if the proceeds of the sale should be insufficient for that purpose, that the petitioners might prove for the deficiency, as well against the joint estate, as against the separate estates, and afterwards elect from which of the estates they would receive dividends; and that it might be ordered that no dividend should be declared, without setting apart so much as would be sufficient to satisfy such dividends.

Mr. Bacon, in support of the petition. The bankers, being fixed with notice of the trusts of the will of *A. Wright*, are liable in all respects, as trustees, for any misapplication of the trust monies; and the point in dispute is, whether the petitioners have not a right to prove against both the joint and the separate estates for any deficiency arising from the sale of the security. [*The Chief Judge*. Has the rule been carried so far, as to render persons jointly and separately liable, when they merely have notice of the trust? It seems that the bankers in this case took upon themselves to act as the agents of the trust.] The bankers chose to take 7000*l.* of the trust monies, and deal with that sum as their own, and then two years afterwards executed a deed, calling themselves executors, when that was not the fact. *A. G.*

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Wright and *J. Wright* were the persons who took the money. The surviving executor *Plowden* knew nothing of the matter. When the mortgage for 7000*l.* was paid off, and the money was entrusted to the bankers, they thought proper to employ it as their own, in laying it out in improper securities. It is expressly stated by the bankrupt *A. G. W. Biddulph*, in his affidavit, that the money was employed without the knowledge or consent of *Plowden*, the surviving executor; *J. Wright* also makes a similar affidavit. There has been a breach of trust by the bankers for their own purposes, and they are therefore liable to all the consequences.

Mr. *Swanston*, for the assignees. *Plowden*, the surviving trustee, entrusted the bankers, as his agents, with large sums of money for the purpose of investment. That was the relation in which they stood with each other. If the money had remained in the bank, the petitioners could only have proved against the joint estate; and now the petitioners take advantage of the bankers having invested the money, by claiming to prove against the separate estates as well. There is no example of such a claim having been allowed in bankruptcy. This is entirely a question as between principal and agent. The bankers were jointly co-trustees with *Plowden*, and not separately liable for contribution to their co-trustee. [The *Chief Judge*. It has been decided, that an assignee is liable to his co-assignee for contribution, for a loss arising from a joint breach of trust (a).] In *Walker v.*

(a) Where a loss to the bankrupt's estate was brought about by the joint act of three assignees, and an Order was made upon the three to make good the loss, and one only paid the whole amount,—upon a bill filed by him against the other two, (although it appeared that they had acted under his representation and advice), contribution was nevertheless enforced against them with costs; *Lingard v. Bromley*, 1 Ves. & B. 114. And see 1 Deac. B. L. 329.

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Symonds (a), where three trustees were involved in one common breach of trust, Lord *Eldon* said, only, that there *may* be contribution between them. There is no precedent for this application. The petitioners have no right to take the security, and prove, also; for if they take the security, they affirm the transaction. We submit therefore, that the petitioners should be put to their election. If they accept the security, they cannot prove against either of the estates; and if they give it up, they can then only prove against the joint estate. If any thing more than this is claimed by the petitioners, the petition ought to be dismissed. The principal here seeks to charge his agent with a breach of trust, which was common to both principal and agent. If the *cestui que trust* had petitioned to charge the bankers with the breach of a constructive trust, he could in that case only prove against the joint estate. In *Ex parte Watson (b)*, where one of several partners applied trust property, with the privity of the other partners, to the purposes of the partnership, it was held that they held the money as debtors to the *cestui que trusts*; but Lord *Eldon* grounds his decision on a breach of contract, and limited the proof to the joint estate. [The *Chief Judge*. Have you any case that covers the point, which I think not covered by *Ex parte Watson*?] *Ex parte Heaton (c)* may perhaps be thought to do so. There, two of the members of a firm, consisting of three partners, were trustees of funds which they misapplied, by making use of them for partnership purposes; and it was held, that, if such misapplication was with the knowledge of the other member of the firm, the *cestui que trusts* might prove against the

(a) 3 Swanst. 77.

(c) Buck, 386.

(b) 2 Ves. & B. 414.

joint estate. [The *Chief Judge*. I think *Ex parte Heaton* does not cover the point.] In *Ex parte Beilby* (a), the proof of the *cestui que trust* was limited to the separate estate of the partner, who committed the breach of trust. A claim in bankruptcy must be founded on contract. The present is not a case of that kind. A claim founded in tort cannot be proved in bankruptcy. There must be therefore an implied contract for indemnity by persons guilty of a breach of trust. [The *Chief Judge*. It comes round to this question—was the act of the bankers in this case criminal?] Although not criminal, it was an act prohibited by this Court. There is also another point in the case, namely, that the debt must be ascertained, before it can be proved. A bond of indemnity under these circumstances could not be proved.

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Mr. *Dixon*, who was with Mr. *Swanston*, on rising to address the Court, was told by the Chief Judge to confine his arguments to the right of proof against the joint estate, as Mr. *Swanston* had made an impression on the Court as to the other point. What is there in the present case, but the ordinary instance of a customer making a deposit of funds with his bankers, who invest the money? Are they to be considered trustees, because their customer himself is a trustee?

Mr. *Bacon*, in reply. The petitioners rest their claim upon this, that the bankers so dealt with the 7000*l.*, as to render them liable as trustees, the same in all respects as if they had been named trustees in the will of *A. Wright*. *J. Wright* in his affidavit expressly states, that, on the deaths of *F. Wright* and *T. Wright*, the

(a) 1 G. & J. 167.

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two first named executors in the will of *A. Wright*, he took upon himself the entire control of the trust fund, which had been deposited in the banking house. He is therefore liable to the petitioners for any misappropriation of the money, and his partners are liable with him. It is not proved any where, that the bankers were mere agents for the purpose of the investment of the 7000*l.*; but it is clear, that their acting partner, *J. Wright*, had taken upon himself to act as a trustee in the management of the trust monies. With respect to the cases that have been cited by the other side,—in *Ex parte Heaton* (a), the Vice-Chancellor expressly says, that those who receive trust property from a trustee, in breach of his trust, become themselves trustees, if they have notice of the trust. And *Ex parte Watson* (b) decided, that, although the *cestui que trusts* in that case might have proved against the separate estate of the partner who had committed the breach of trust, they might equally prove against the joint estate of the partners, who had possessed themselves of the trust property. The petitioners have a right therefore in this case, to prove both against the joint and separate estates, and to make their election afterwards, out of which estate they will receive dividends.

It appears that the bankrupt, *A. G. W. Biddulph*, is the tenant for life of the trust property, under the will of *A. Wright*, with remainder to his son, who is now only fourteen years of age. As it is clear, that the rights of this infant *cestui que trust* cannot be prejudiced by his becoming a party to this petition, we therefore ask leave to amend the petition, by making him a party.

(a) Buck, 386.

(b) 2 Ves. & B. 414.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—This is a petition presented, in effect, by the trustees under the will of *A. Wright*, and by them alone, without associating the *cestui que trust*. There may be relief, to which the *cestui que trust* is entitled; and if I saw my way clearly, that it was requisite for the purposes of justice, that the *cestui que trust* should be made a party to the application, I should have directed the petition to be amended for that purpose. I do not think, however, that it is safe for the interests of the *cestui que trust*, under the circumstances of this case, that he should be made a party to this petition; for it is possible, that his rights may be somewhat injured by that proceeding; as the association of his name with those of the trustees might affect his rights against them by bill, or petition; what I now do, however, will not prejudice his rights in either of those respects. As a petition, therefore, by the trustees alone, I can only view them in the light of ordinary customers of the bank. And, in that view, I cannot look upon this as a joint and separate liability of the bankers as trustees, but a liability only as between banker and customer. The mortgage was not on any part of the bankrupts' estate; and, if the present petitioners were willing to give up that security for the benefit of the bankrupts' estate, it would be impossible for them to do so, without the consent of the *cestui que trust*. Still, there may be a right of proof against the joint estate; and that will depend upon the question, whether this dealing with the 7000*l.* was authorized by the trustees. I do not think it expedient to pronounce a positive judgment upon that question; but I think, upon the evidence before me, that Mr. *Plowden* is not fixed with an assent to the dealing with the money by Mr. *J. Wright*, and

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that the executors of Mr. *Plowden* have a right to consider the money as being in the hands of the bankers, at the time of their bankruptcy. I give that opinion, however, merely because the matter has been so fully gone into; but I mean to decide nothing on that point, at present, as the petitioners have not yet gone before the Commissioner. Let the petition therefore stand over, with liberty for the petitioners to go before the Commissioner, and make such proof as they may be advised; reserving the question of costs, with liberty for either party to apply to the Court. The *cestui que trusts* have, I think, a clear right to the benefit of the mortgage.



Ex parte HENRY SMITH.—In the matter of JAMES
GRANT SMITH.—

Lincoln's Inn,
August 1.

A. and B. enter into a joint and several bond to C., D., and E.: C. delivers the bond to A. (who was her son) for safe custody, and, after for some time receiving the interest from A., she, and D., another of the obligees, die. B., one of the obligors, also dies; when his executors and A. make an arrangement together, without the privity of E., the surviving obligee, and erase the name and seal of B. from the bond. Held, that this did not invalidate the bond as against A.; and that on his bankruptcy, the surviving obligee might prove for the amount of the principal and interest due upon the bond.

THIS was the petition of a surviving obligee to prove on a bond.

The petitioner, together with *Elizabeth Smith*, *Opie Smith*, and the bankrupt, were the executors of the will of *William Smith*, the father of the petitioner and the bankrupt; and, in the execution of the trusts under the will, the bankrupt and *Robert Smith* executed a joint and several bond to the petitioner, and *Elizabeth Smith* and *Opie Smith*, in the penal sum of 6000*l.*, bearing date the 26th May 1809, with the following condition, viz., that the bankrupt and *Robert Smith* should, upon receiving six months previous notice in writing under the hands of the said *Elizabeth Smith*, *Opie Smith*, and

the petitioner, or the survivor of them, or the executors of such survivor, immediately after the expiration of such notice, make and execute, or cause and procure to be made and executed, unto the obligees, or the survivor of them, or the executors or administrators of such survivor, an adequate charge upon lands, tenements and hereditaments, or an assignment or transfer of government stocks or funds of sufficient value, in conformity to the directions of the will of the said testator *William Smith*, with a covenant therein collaterally to secure the due and punctual payment of the full sum of 3000*l.* to the obligees, or the survivor of them, or the executors or administrators of such survivor, on such future day, and at such future time, as should be then agreed upon by and between the obligees, together with interest in the meantime upon the said sum of 3000*l.*, at the rate of 5*l.* per cent. per annum, by even and equal quarterly payments, the first payment thereof to be made at the expiration of three months next after the day of the date of the said bond. But if the obligees should think fit to call in the said principal sum of 3000*l.*, and give to the obligors twelve months previous notice in writing under their hands, then the obligors bound themselves to pay to the obligees the whole of the said principal sum of 3000*l.*, together with all interest then due thereon.

Elizabeth Smith died in September 1820, and *Opie Smith* in the year 1836; so that the petitioner became the sole survivor of the obligees named in the bond.

Elizabeth Smith having been during her lifetime the acting executor and trustee under the testator's will, and *Opie Smith* and the petitioner not having taken any active part in the administration of the testator's estate, the bond remained in the possession of *Elizabeth Smith*

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up to and at the time of her decease ; and all the interest, which from time to time became due and payable thereon during her lifetime, (excepting only on two occasions in the years 1810 and 1812 respectively, when a portion of such interest was received by the petitioner), was paid to and received by *Elizabeth Smith*.

Upon the decease of *Elizabeth Smith*, the bond was taken possession of by her daughter and executrix *Elizabeth Smith* the younger, who was also one of the three daughters of the testator *William Smith*, and entitled under his will to part of the interest secured by the bond. *Opie Smith* having refused to act further in the trusts under the will, and the several parties interested being desirous that the petitioner should not interfere therewith, the petitioner alleged that he did not in any manner interfere respecting the bond, or the payment of the interest due thereon ; and the bond continued in the possession of *Elizabeth Smith* the younger until May 1821, when it was delivered by her to the bankrupt, at his request, but without the knowledge or consent of the petitioner, and, as the petitioner alleged, not for the purpose of releasing or giving up the same, or the sums thereby secured, but in the confidence that the same would be taken care of by the bankrupt, for the benefit of the several parties interested therein.

E. Smith, the daughter, having intermarried with *John Smith*, who died in her lifetime, also died in April 1837, leaving *William Smith*, her only child, surviving her, who was then an infant under the age of twenty-one years, and who, with *Charlotte Smith*, the surviving daughter of the testator, had become entitled in equal shares to the sum secured by the bond. At the date of the bond, the bankrupt was in partnership with *Robert*

Smith, the other obligor. *Robert Smith* died in the year 1817; when it was arranged between his executors and the bankrupt, that the bankrupt should take *Robert Smith's* share in the business at a valuation, and that he should also take upon himself the payment of the whole amount of the bond. On the completion of this arrangement, the bankrupt produced the bond to the executors of *Robert Smith*, who did not require it to be given up, but were content to have *Robert Smith's* name erased, and his seal removed from it, which was accordingly then partially carried into effect; but such arrangement was made, wholly, without the knowledge or sanction of the petitioner. In pursuance, however, of this arrangement, the interest which from time to time became payable under the bond, was duly paid or accounted for by the bankrupt to *Elizabeth Smith* the daughter, *Charlotte Smith*, and *Ann Gauntlett*; during the lives of *Elizabeth Smith* and *Ann Gauntlett*, and after their respective deaths, the interest of 1500*l.*, being one moiety thereof, was also paid or accounted for by him to *Charlotte Smith*; and various payments were, as it was alleged, made by the bankrupt on account of the interest on the remaining sum of 1500*l.*, for the maintenance and education of the infant *William Smith*.

In consequence of complaints made to the petitioner by *Charlotte Smith*, that her interest money was in arrear, the petitioner (as the surviving obligee in the bond) at her request, in March 1841, applied to the bankrupt to deliver up the bond to the petitioner, and to pay the interest then due thereon, as well as the principal; and the petitioner afterwards made several applications to him for the like purpose, but without effect, until the 11th January 1842, when he delivered up the

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bond to the petitioner; and the petitioner then discovered, that the name of *Robert Smith* (the other obligor in the bond) had been erased, and that his seal had been partly removed, which the petitioner was wholly ignorant of before.

On the 27th January 1842, the fiat was issued against *J. G. Smith*; and on the 2nd March 1842, the petitioner was admitted to prove under the fiat for the principal sum of 3000*l.*, owing to him on the bond; but, on the 10th May 1842, the Commissioners ordered the proof to be expunged, upon the ground that the name of *Robert Smith* had been erased, and his seal removed from the bond.

In November 1841, *Charlotte Smith*, and *William Smith* by *John Smith* his next friend, filed a bill in Chancery against the bankrupt, and the petitioner, the representatives of *Opis Smith* deceased, and the several persons who would be entitled to the sum of 3000*l.*, in the event of the death of *William Smith* before he attained his age of twenty-one years, praying for an account of what was due in respect of the said sum of 3000*l.* and interest, and that the same might be paid and invested for the benefit of the several persons entitled thereto. Before any answers were put into this bill, *J. G. Smith* became bankrupt; and, after the proof had been expunged as before mentioned, the plaintiffs filed a supplemental bill against the same persons, and also against the bankrupt's assignees, praying for the same relief against the assignees, as against the defendant *J. G. Smith*, in case he had not become bankrupt; and that the assignees might be restrained from distributing the bankrupt's estate and effects, without reserving for the plaintiffs, with the other parties entitled to the said

legacies, an equal dividend with the other creditors of the bankrupt, and preserving the lien on his real estate, which was therein alleged to have been established and created by the bond.

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The prayer was,—That the petitioner might be at liberty to go before the Commissioner, and prove for the principal sum of 3000*l.* owing on the bond; and that the dividends to become payable on such proof might be paid into the Court of Chancery, to the credit of the suit so pending therein.

Mr. *Bacon* appeared in support of the petition.

Mr. *Chandless*, *contra*. The only claim that the petitioner can have to prove against the bankrupt's estate, is, as obligee under the bond, not as trustee under the will; his whole right of proof therefore depends upon the validity of the bond. It was made by the bankrupt and *Robert Smith* to three obligees, one of whom was the mother of the bankrupt, and who delivered it up many years ago to the bankrupt, one of the obligors. [The *Chief Judge*. Have you any proof, as to who were the parties to the transaction of breaking off one of the seals?] Nothing more than what is stated in the petition. But it is submitted, that if a joint and several bond be cancelled as to one of the obligors, it is gone as to both; this doctrine is clearly laid down in *Seaton v. Henson* (a). It was held, certainly, in *Collins v. Prosser* (b), that, where a bond was only *several*, the obligees, by removing the seal of one obligor, did not render it void as to the others. But in that case Mr. Justice *Bayley* expressly says in his judgment, that, where the bond is

(a) 2 Show. 29.

(b) 1 E. & C. 682.

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*joint and several*, for payment of an entire sum of money, whatever discharges one of the obligors may discharge them all. The Commissioners were therefore right in expunging this proof.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—There is no doubt, that, where a bond is joint and several for the payment of a sum of money, and the obligee consents to the release of one of the obligors, he releases both; and the same, if he delivers up the bond to one of the obligees; but then this must be done, *animo cancellandi*. Here the cancelling of *Robert Smith's* name was not even with the privity of any one of the obligees, but was effected by his executors and the bankrupt, the other obligor. Under the circumstances of this case, therefore, I am of opinion, that the cancelling or mutilation of the bond, as to the execution of it by *Robert Smith*, does not in any way affect the right of proof by the petitioner, the surviving obligee, against the estate of the bankrupt, the surviving obligor. Let the petitioner go in under the fiat, and make such proof as he can for the amount of the principal and interest due on the bond; and this he will be enabled to do, notwithstanding the bond is in the possession of the obligee. For although, formerly, where a bond was lost or could not be produced by the obligee, he was obliged to come into a Court of Equity for relief, and equity decreed a new bond,—yet in modern times, since the change in the law relating to *profert*, which was made by the case of *Read v. Brookman (a)*, where it was held that a deed might be pleaded as lost by time and accident, without *profert*, a party now is not compelled, under these cir-



cumstances, to apply to a Court of Equity to establish his rights at law against the obligor. If the petitioner establishes his proof, then let the costs of this petition come out of the estate; but not otherwise. The assignees' costs will of course come out of the estate.

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Ex parte PERKES.—In the matter of BAYLIS.

*Lincoln's Inn,  
Aug. 5.*

THIS was the petition of an assignee, for leave to bid at a sale of part of the property of the bankrupt, upon an undertaking not to interfere in the conduct of the sale, or on being discharged from being assignee, if the Court required it. The property in question consisted of the stock in trade and machinery of a crape manufactory at Reading and Tottenham. The assignees had elected to abandon the lease of the manufactory, on account of the rent being too high; and it was stated, that the machinery and stock in trade were of such a kind, and that the number of persons requiring them would be so limited, that there would probably be little or no competition, and the property would be likely to be sold at a very low price.

An assignee may be removed, at his own request, in order that he might bid at a sale of part of the bankrupt's estate.

Mr. *Swanston*, in support of the petition.

Mr. *Russell* appeared for the two other creditors' assignees, and consented to the application.

The COURT ordered, that the petitioner should be removed from the office of assignee, at his own request, but that there should be no new choice, unless the Com-

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missioner should consider it necessary. The petitioner to bear his own costs, and the other costs to come out of the estate.

Ex parte RICHARD MUSGROVE.—In the matter of RICHARD MUSGROVE.

And Ex parte JOHN RUSSELL, LILLEY ELLIS, and SAMUEL CLOWES in the same matter.

*Lincoln's Inn,*  
*October 31.*

Where a trader had been summoned before a Commissioner, under 5 & 6 Vict. c. 122. s. 11., and before the proper time had elapsed to constitute an act of bankruptcy, within the meaning of the 13th section, a fiat was by mistake issued, which was afterwards annulled: *Held*, that the existence of this fiat was such an

THESE were two petitions to annul; one presented by the bankrupt, and the other by the petitioning creditors.

The petitioning creditors served the bankrupt with a summons, dated 2nd September 1843, to appear before the District Court of Bankruptcy at Birmingham, and to admit a debt due from him to the petitioners, for the purpose of laying the foundation for an act of bankruptcy under the 5 & 6 Vict. c. 122. ss. 11, 14(a). The bankrupt appeared and admitted the debt; and the petitioning

(a) See *post*, Appendix, p. iv.

obstruction to the payment of the petitioning creditor's debt, that if he sued out a new fiat founded on the omission to pay, &c., according to the terms of the 14th section of the above act, the Court would annul such new fiat.

*Quere*, whether payment of the debt, after the issuing of the improperly issued fiat, would have constituted an act of bankruptcy under 6 Geo. 4. c. 16. s. 8.

Where there are two petitions in the same bankruptcy an affidavit entitled generally in the bankruptcy is regular; but, if it do not point with sufficient distinctness to the petition, in the matter of which it is proposed to read it, time will be given to file an affidavit in answer.

A trader, against whom a fiat has improperly issued, is requested by the petitioning creditor to consent to an order to annul, on payment of the costs &c. of the application; the proposed Order not providing for the costs of annulling the fiat, and incidental thereto. The trader does not object, on the ground of this omission, but requires other and unusual words to be added to the proposed order, which the petitioning creditor declines inserting. *Held*, that this negotiation did not deprive the trader of his costs, on his afterwards presenting a petition of his own to annul.

*Quere*, whether a person who has sued out a fiat, which is annulled for want of the legal requisites, may strike a fresh docket, without the leave of the Court.

creditors, by mistake, conceiving that the fourteen days mentioned in the act were to be reckoned from the issuing of the summons, instead of from the filing of the admission of debt, struck a docket on the 21st of September, which was only twelve days from the filing of the admission. On discovering their mistake, they prepared a petition, praying that the fiat might be annulled, with liberty to the petitioners to sue out a new fiat, and offering, by their petition, to pay the bankrupt's costs, charges and expenses, of and incidental to that application, but not offering to pay his costs charges and expenses of annulling the fiat, and incidental thereto. They then applied to the bankrupt, requesting him to agree to give a consent brief to counsel, upon the hearing of the proposed petition; but the bankrupt's advisers declined consenting, unless the proposed order gave the bankrupt his costs of, and occasioned by, the fiat. On the petitioning creditors declining to include these costs in the Order, the bankrupt would not enter into the agreement, and both the present petitions were presented.

The bankrupt, by his petition, sought to have the fiat annulled, on the ground that there was no act of bankruptcy, the fiat having been issued before the time prescribed by the act had expired; and he stated, in his affidavit in support of the petition, that, before the expiration of that time, he was ready and willing to pay the debt, but was prevented from so doing, by being unable, as he was advised, to pay the same safely during the existence of the fiat.

Upon the bankrupt's petition being called on, the question was, how the costs of it were to be disposed of.

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Mr. *Swanston*, and Mr. *Sturgeon*, in support of the bankrupt's petition.

Mr. *Anderdon*, for the petitioning creditors, contended that they ought not to pay any costs, as they had offered the bankrupt every thing which he could obtain by this petition. In order to corroborate this statement, he proposed to read an affidavit, filed by the petitioning creditors in support of their own petition.

Mr. *Swanston*, and Mr. *Sturgeon*, objected, that the affidavit could not be read upon the bankrupt's petition, no notice of the respondent's intention to read it having been previously given. [The *Chief Judge*. What is there to show that this affidavit is filed in the matter of the other petition? It is only entitled in the bankruptcy, generally, and I always understood that that was sufficient, according to the practice.] Such a practice must lead to great inconvenience; as a party, in searching for affidavits, would have to look at affidavits, which had nothing to do with the petition in which he was interested. If the Court should not think the title of the affidavit defective, at all events, some notice ought to have been given, so that we might have known what affidavits were intended to be used on this petition.

THE CHIEF JUDGE.—In the absence of any authority showing that the title is insufficient, I should say, from the reason of the thing, and from my own recollection of the practice, that the title of this affidavit is sufficient. It is another question, whether there is a sufficiently pointed reference to this petition, in the affidavit, to deprive you of the opportunity of having time to answer it.

The counsel for the bankrupt did not ask for time to answer the affidavit, and the affidavit was read.

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Mr. *Anderdon*. It appears by this affidavit, that the respondents were ready to agree to all that the bankrupt could have obtained upon his own petition. The costs, to which he wished the Order to extend, are costs which are never included in such an Order. He cannot throw any blame on the respondents for not agreeing to take an Order, which was not conformable to the practice of the Court. [The *Chief Judge*. Probably the respondents meant to offer the common order, but the question is, whether they did?]

Mr. *Swanston*, in reply. We submit, that they did not. The Order proposed to be taken did not provide for the costs of annulling the fiat, and incidental thereto, and was therefore not so beneficial an Order, as the petitioner was entitled to.

On the first petition, the fiat was annulled; judgment reserved as to costs.

The petition of the petitioning creditors was then called on.

Mr. *Anderdon*, in support of the petition.

Mr. *Swanston*, and Mr. *Sturgeon*, *contra*. This petition must be dismissed with costs. The fiat is already annulled; and, as to the part of the prayer which seeks liberty to issue a new fiat, it is unnecessary, as the new fiat, if capable of being supported on other grounds, would not fail for being issued without the leave of the

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Court, the other fiat not having been annulled for want of prosecution; *Ex parte Thomas* (a). If the leave of the Court be requisite, this is not a case in which such leave will be given; for the petitioners do not show any act of bankruptcy to have been committed. The non-payment of the debt at the end of the fourteen days, is not an act of bankruptcy; because the existence of the fiat would have rendered it an act of bankruptcy to pay the debt to the petitioning creditors under the 6 Geo. 4. c. 16. s. 8. (b); and nothing so absurd can have been the intention of the legislature, as to provide that nonpayment should be an act of bankruptcy, where the payment would be an act of bankruptcy. [The *Chief Judge*. I did not mean in *Ex parte Thomas* to decide the question, as to the propriety of obtaining the leave of the Court, before a new fiat was sued out by the same petitioning creditor, who had sued out one, which had been annulled for want of the legal requisites. All I meant to

(a) *Ante*, p. 307.

(b) 6 Geo. 4. c. 16. s. 8. "That if any such trader liable by virtue of this act to become bankrupt shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction or security shall be an act of bankruptcy, and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned or any other act of bankruptcy, and every person so receiving such money, gift, delivery, satisfaction or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction or security as aforesaid, or the full value thereof, to such person or persons as the Commissioners, acting under such original commission, or any new commission, shall appoint, for the benefit of the creditors of such bankrupt."

decide was, that, if he succeeded in obtaining a fiat from the office, without the leave of the Court, such a fiat was not necessarily bad. I gave no opinion on the general practice, which ought, however, to be settled in one way or the other.] The petitioners must deliver themselves from this dilemma; either the Order of the Court is unnecessary, or, if it be necessary, they have made no case to entitle them to it. It is impossible, that any Court could hold an act of bankruptcy to have been committed.

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Mr. *Anderdon*, in reply.

The CHIEF JUDGE.—Without giving any opinion, as to whether an act of bankruptcy has been committed, I am not disposed to interpose a bar to the petitioners' incurring the peril of suing out a new fiat, if they shall be so advised.

Mr. *Anderdon*. They would prefer being guided by the opinion of the Court, as to the validity of the act of bankruptcy.

The CHIEF JUDGE.—I have no jurisdiction to decide that question upon this application.

[Upon both parties requesting his Honour's decision on this point, and agreeing to be bound by it, the question as to the validity of the act of bankruptcy was then argued.]

Mr. *Anderdon*. The only objection made to the validity of the act of bankruptcy, arising on nonpayment of the debt, is, that the petitioner could not pay it, without committing an act of bankruptcy under the 6 Geo. 4.

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c. 16. s. 8. But, to bring the payment within that provision, the existence of an invalid fiat is not enough. The status of bankruptcy must really exist; an act of bankruptcy must have been committed. The words of the section are, "if any such trader, liable by virtue of this act to become bankrupt." Now a trader would not be liable to become bankrupt, unless he had committed an act of bankruptcy. [The *Chief Judge*. Are not those words merely a part of the definition of a person liable to become bankrupt, by reference to the terms of the 2d section of the act?] Your Honour refused to decide in *Ex parte Smith* (a), that such a payment, as that now in question, would be within the act. [The *Chief Judge*. I left the question entirely open, and expressly guarded myself against being misunderstood, as deciding points which I intended to leave untouched.] The payment, to be within 6 *Geo.* 4. c. 16. s. 8., must be one by which the petitioning creditors may receive more in the pound than the other creditors. It is clear, that, in order to bring the case within the operation of the clause, there must be a corrupt bargain between the trader and the petitioning creditor. No other case could have been contemplated by the act. And it cannot be supposed, that the 8th section of 6 *Geo.* 4. c. 16. was overlooked, when the new statute 5 & 6 *Vict.* c. 122. was passed, the 14th section of which makes the want of payment or security, according to the terms of the clause, an act of bankruptcy in every case.

THE CHIEF JUDGE. In *Ex parte Smith* (a) you argued, Mr. *Russell*, that, if a fiat were issued against the richest merchant in London, without any foundation,

(a) *Ante*, p. 144.

he could not pay the petitioning creditor's debt, without committing an act of bankruptcy under the 6 *Geo.* 4. c. 16. s. 8.

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Mr. Russell, amicus curiæ. My argument there coincided with my own opinion upon the construction of the section.

Mr. Anderdon. I submit, that this cannot be the right construction of the clause; the fiat, which it contemplates, must be one capable of being worked for the benefit of the body of creditors; and the transaction between the trader and the petitioning creditor, to come within the meaning of the act, must be a bargain to the disadvantage of other creditors; which could not be the case here, as the fiat could not stand, for want of the legal requisites.

Mr. Swanston, and Mr. Sturgeon. In another case of *Ex parte Smith (a)*, the petitioning creditor would not accept payment in full, without the direction of the Court, although the assets realized were much more than sufficient to pay 20s. in the pound, from fear of the operation of the 8th section of the 6 *Geo.* 4. c. 16., as two creditors to a small amount had not in fact been paid, they having declined to prove.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—In the present case, I think one Order may be made on both petitions. That the existing fiat must be annulled, is admitted on both sides; and, according to the ordinary course—the course which must be followed, unless a

(a) 2 G. & J. 291.

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case can be made on the part of the petitioning creditors for a different decision,—the fiat must be annulled, with costs, not only of this application, but of annulling the fiat.

It is however contended, on the part of the petitioning creditors, that these costs ought to be diminished, by reason of an offer made by their solicitor, in the course of the vacation, to annul the fiat, without the necessity of coming to the Court itself; and that, inasmuch as that offer was not accepted, the costs ought to be decreased.

The material circumstances as to that part of the case are these. The proposed Order was to annul the fiat, with costs of the application, without adding “the costs of annulling the fiat, and incidental thereto,”—the form of Order, which, as I understand, would be according to the usual course of the Court. The objection, however, that these words were omitted, was not taken on behalf of the alleged bankrupt. Those who advised him insisted on the addition of other words, which are unusual, and which are not according to the ordinary practice. They also insisted on the petitioning creditors giving an undertaking not to issue another fiat; but they did not, as I have said, object that the words “the costs of annulling the fiat, and incidental thereto” were not included in the proposed Order. I think, that the terms and conditions suggested on behalf of the alleged bankrupt were untenable.

Both parties therefore were in error, as regards the terms of the proposed Order; but I cannot help thinking it probable, that, if the advisers of the alleged bankrupt had said that the proposed Order was not according to the ordinary course, those who were concerned on behalf of the petitioning creditors would have acceded to the Order being drawn up in the usual form.

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However, the petitioning creditors being wrong in striking the docket, and being under a *prima facie* liability to pay all the costs, on them is the burthen of making out that they were clearly in the right, when they proposed a course, with a view of preventing the case from coming before the Court and terminating it by consent or submission. This they have not done; and, although the alleged bankrupt did not give the right reason for not acceding to the proposed Order, yet, as the proposed Order was in itself erroneous, and moreover, as the petitioning creditors avowed their intention of issuing another fiat, I think, on these united grounds, that I ought not to make any difference in the form of the Order on account of what has taken place. I will reconsider, however, this part of the case, and state to-morrow morning, if I take a different view of it. If I should say nothing more on the subject (a), the Order will be drawn up in the usual form.

With respect to the other petition, for leave to issue another fiat, I think the petitioning creditors should pay the costs of it, and should be at liberty to strike another docket, without prejudice to any question whether it may, or may not, be struck without the leave of the Court. But both parties have concurred in submitting to the Court this question—whether the Court would allow the new fiat to stand, if no other act of bankruptcy were established than that now before the Court. Upon the joint application of both parties, I have considered, and have no objection to state my opinion on this question. The alleged act of bankruptcy depends upon the 14th section of the act 5 & 6 Vict. c. 122. It appears, that *Musgrove* is a trader,—that he has been


(a) His Honour did not mention the case again.

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served with notice according to the provisions of the 11th section of that act,—that he appeared and signed an admission of debt according to the 13th section,—and that he has not, within fourteen days after filing such admission, paid, or tendered and offered to pay, to the creditor the amount of the demand, or secured or compounded for the same to the satisfaction of the creditor.

If, therefore, there were no more in the case, this would constitute an act of bankruptcy. But it now appears, that, before the fourteen days had elapsed, and while the law allowed the trader the power of preventing the inchoate act of bankruptcy from becoming complete, the petitioning creditors, through error, took a step, which, at the very least, interposed very great doubt embarrassment and difficulty in the way of the alleged bankrupt doing what the law allowed him to do, for preventing an act of bankruptcy from taking place. Without therefore saying, whether, in point of legal strictness, an act of bankruptcy has, or has not, in fact been committed (a point on which I entertain an opinion), and without deciding what is the true construction of the 6 *Geo. 4. c. 16. s. 8.*, I think, considering the principles by which the Court is guided in exercising its discretionary jurisdiction to annul fiats, that it would be its duty to annul a fiat, which might be issued by these petitioning creditors, founded upon such an act, or supposed act, of bankruptcy,—they themselves having created the species of obstruction to which I have referred. If therefore they shall think fit to issue a fiat, founded on the alleged act of bankruptcy now suggested, they will do so, with the knowledge of the present opinion of the Court, given at the request of both parties upon the subject.



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Ex parte WILLIAM MITCHELL and others.—In the matter of PHILIP BEYFUS, and SOLOMON BEYFUS.

Lincoln's Inn,
October 31.

THIS was the petition of five of the creditors of the bankrupts, resident at Birmingham, for the transfer of the fiat from the Court of Bankruptcy to the District Court of Birmingham. The fiat had been opened in London, and two of the petitioners had been chosen assignees. The grounds on which it was sought to change the venue of the fiat were, that of 3500*l.*, the amount of the debts, 600*l.* only was due to London creditors, while upwards of 2000*l.* was due to creditors residing at Birmingham, or in the immediate neighbourhood of that town; that one of the petitioners, who was an accountant, had offered his services gratuitously on the investigation of the accounts, if the fiat were prosecuted in Birmingham; that the bankrupts, who carried on business as importers of French goods and manufacturers of steel pens in Houndsditch, in the city of London, had also a house for the reception of goods in Pershore Street, Birmingham.

Where a fiat has been opened, and the bankrupt's examination has commenced, it is a sufficient answer to a petition, to change the venue of the fiat, that the petitioners do not make out a grave case of benefit to the estate, combined with the absence of injustice to the bankrupt.

The fiat issued on the 3rd August 1843, and the debts already proved amounted to 1592*l.* 13*s.* 11*d.* of which 1449*l.* 7*s.* 8*d.* had been proved by Birmingham creditors.

Mr. *E. James*, in support of the petition, cited *In re Snelling* (a).

The CHIEF JUDGE.—Can I change the judge who is to decide upon questions materially affecting the interests of the bankrupts after the judge has commenced the

(a) 2 Deac. 557.

1843.

Ex parte
MITCHELL
and others.

course of adjudication, especially now, when the Commissioner's decision as to the certificate may be conclusive?

Mr. *Swanston*, for the bankrupt, *contra*. No precedent has been produced for such an Order as is now sought, where the fiat has been opened. Here the assignees have been chosen, and the bankrupt has been examined. It would be most indecorous and inconvenient to change the tribunal after the investigation into the affairs of the bankrupt has commenced. He cited *Ex parte Fellowes (a)*.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The burden lies upon the petitioners to show a grave case of benefit to the estate, combined with the absence of injustice to the bankrupt, in the proposed transfer of the fiat. Here they have not made out such a case, and, therefore, for that reason alone, I think the petition must be dismissed.

ORDERED accordingly. Costs out of the estate.

(a) 2 Mad. 141.



Ex parte WOODIN.—In the matter of DANIEL WADE
ACRAMAN, WILLIAM EDWARD ACRAMAN, and ALFRED
JOHN ACRAMAN.

1843.

Lincoln's Inn,
Nov. 1.

THIS was an appeal from the decision of the Commissioner, admitting a proof for 2000*l.* and interest, against the separate estate of *Daniel Wade Acraman*, the petitioner contending that the right of proof was against the joint estate only.

The following were the circumstances of the case, as they appeared from the affidavits, and from admissions at the bar.

A sum of 2000*l.*, secured by the bond of *Henry Hawkes* to *John Acraman*, since deceased, and *Henry Watson*, was, by the settlement, made previously to the marriage of Mr. and Mrs. *Hawkes*, in the year 1829, declared to be vested in *John Acraman* and *Thomas Watson*, upon trust to invest the same, when received, in parliamentary or public funds or government or real securities, for the benefit of the wife for her life, for her separate use, but without power of anticipation, with remainder to the husband for life, and remainder to the children of the marriage. In May 1834 this bond-debt was paid, and the money was, in the month of June following, lent by *John Acraman*, with the sanction, as it was alleged, of his co-trustee, Mr. *Watson*, to the firm of the bankrupts, who were merchants, at interest at five *per cent.*, but without security.

The interest appeared to have been paid by the firm to the trustee, *John Acraman*, until his death, which

By a marriage settlement a sum of money was to be received by the trustees, and invested in government or real securities, and the interest was to be paid to the wife for life for her separate use, without a power of anticipation, with remainder to the children. One of the trustees receives the money, and advances it to a partnership of merchants, without taking any security. He receives the interest from the partnership, and pays it over to the wife regularly up to the time of his death; afterwards, the partnership pays the interest to the wife directly, and without the intervention of the surviving trustee. In the partnership books the accounts relating to the whole transaction are entered, as between the wife and the partnership only. Upon the partnership becoming bankrupt; *Held*, that the partners had constituted themselves directly trustees, and that the proof on behalf of the trust estate might be made either against the joint estate, or the separate estates. *Quære*, whether there would have been a right of proof against the separate estates, if the firm had been constructive trustees only; or whether the term "constructive trust" is sufficiently definite to admit of any general rule being laid down upon the point.

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converted into individual trustees, so as to give the *cestui que trust* a right of proving against the separate estate of each. In *Ex parte Beilby* (a), the point might, and no doubt would, have been taken, if it were tenable. The liability of the bankrupts arose at the instant of the receipt of the money by them, and was then, and must still be, a joint liability only.

But even admitting that there would have been a joint and separate liability, had the parties remained solvent, it does not follow, that there will be a right of proof against the separate estate. To give a right of election in bankruptcy, there must be an express and not merely an implied liability of both estates. The creditor must have contracted for the double liability, and must have a right of suing the bankrupts jointly or severally. Now here it would be impossible for proceedings to have been taken against any partners individually.

Mr. *Swanston* and Mr. *Wood*, *contrâ*. There is no authority for the distinction between direct and constructive trust. With regard to the former, the rule has been long established, that a breach of trust creates a joint and separate liability; *Keble v. Thompson* (b). *Ex parte Beilby* (a), cited on the other side, is really an authority in our favour. The bankruptcy cannot vary the liability; for as a creditor claiming in respect of a breach of trust had a complete equitable right against each of the bankrupts, and could enforce such rights against any one of them at his option, the circumstance of the bankruptcy intervening ought not to make any difference. It is true that in *Ex parte Heaton* (c), and *Ex parte*

(a) 1 G. & J. 167.

(b) 3 Bro. C. C. 112.

(c) Buck, 386.

Watson (a), and in other cases, proofs were allowed to be made against the joint estate ; but it does not follow, that if the question had been raised, the proof would not have been allowed against the separate estates, if there were any. In *Ex parte Heaton* there was no separate estate. In none of the cases is any distinction in the rules of equity as regards their application to bankruptcy contended for.

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WOODIN.

Mr. *Stinton*, for the assignees.

Mr. *Anderdon*, in reply.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—It is unnecessary to consider how the case would have stood, if the bankrupts had kept or opened an account with the trustees, or either of them, in respect of the sum in question. They did not do so. The only account relating to it, which they appear to have kept or opened, was with Mrs. *Hawkes*, a married woman, the equitable tenant for life of the income of the trust fund, for her separate use, under a restraint against anticipation.

The bankrupts were merchants, but not ordinary bankers, and their account commences thus: [His Honour read the account as above set out.] The balance is carried on with intetest from time to time through the years 1835, 1836, 1837, and 1838, the whole being a continuation of the same account, under the single name of *Anne Jones Hawkes*; and it is agreed on all hands, that the account was continued, in the same manner, up to the time of the bankruptcy. In 1837, with reference to the death of *John Acraman*, the three bankrupts

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signed this entry in their books. [His Honour read it.] The interest, as I have said, was paid from time to time by the bankrupts to this lady, probably during *John Acraman's* lifetime, through him, but after his death, which happened in May 1836, to herself, and as I collect, without any direction or intervention on the part of Mr. *Watson*, the co-trustee of Mr. *John Acraman*, who is still living. It is stated at the bar, that two of the bankrupts were the executors of *John Acraman*, but they do not appear, so far as this matter is concerned, to have acted in that capacity, nor do I think the fact material. Mrs. *Hawkes*, a married woman, restrained from anticipation, was incapable of assenting to the mode in which the capital was invested or lent; which, it is agreed on all hands, was, as between the trustees and the *cestuis que trustent*, a breach of trust.

The condition of the evidence is such as to render it necessary, in my opinion, for me to assume, that the bankrupts had actual notice of the nature of the trusts, to which the fund in question was liable. And the facts of the case, taken altogether, including of course the particular character of the entries in the books, establish, in my opinion, the proposition, that the three bankrupts had made themselves in effect directly trustees of the fund,—not regularly trustees, I agree, but, for every purpose of liability, complete trustees; and consequently, under the circumstances, jointly and severally liable to restore it. The petition must be dismissed with costs, to be paid out of the separate estate of *D. W. Acraman*. The dividends upon the proof must be dealt with as the Court shall direct. The term “constructive trust” has been much used in the course of the argument. It is a flexible term, of considerable extent, and perhaps not

capable of any very precise definition. I wish not to be understood as giving any opinion on the argument, with reference to such trusts. Upon the nature of the liabilities arising from constructive trusts, whatever that term may mean or comprehend, I say nothing (*a*).

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Ex parte
Woodie.

Petition dismissed, with costs.

(*a*) See *Ex parte Burton*, *ante*, p. 364.



Ex parte STEWARD.—In the matter of DODSHON BLAKE.

Lincoln's Inn,
July 20 and
Feb. 16, 1844,
before the Lord
Chancellor and
the Court of
Review.

THE circumstances of this case are stated in the report of the hearing, *ante*, p. 265. The Order, after declaring that the East of England Bank were equitable mortgagees, referred it to the Commissioner acting in the prosecution of the fiat to take an account of what was due to the petitioners, in respect of their securities, in the usual form, and also referred it to the Commissioner to inquire and state to the Court how and in what manner, with reference to the interests of all parties concerned, the security of the East of England Bank, on the bankrupt's share and interest under the agreement of the 20th of May, could best be made available; and the Commissioner was to be at liberty to state any special circumstances. When the parties went before the Commissioner upon this reference, the Commissioner declined proceeding in the inquiries referred to him by the Order, upon the ground that the Court of Review had no jurisdiction to direct references to the Commissioners (*b*).

The Commissioners are bound to execute Orders of reference made by the Court of Review; but neither that Court, nor the Lord Chancellor, can compel the Commissioners to execute such Orders.

(*b*) See *Ex parte Rolfe*, 3 M. & A. 316; 2 Dea. 421; *Ex parte Gore*, *ante*, p. 78; and *Ex parte Curlew*, *ante*, p. 362.

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STEWART.
July 20.

Mr. *Koe*, on behalf of the petitioner, now applied to the Court of Review for the direction of that Court under the very peculiar circumstances of the case.

The CHIEF JUDGE intimated his intention of communicating with the Lord Chancellor, in order that, if his Lordship should think fit, the question might be brought immediately before his Lordship, and disposed of by him.

Shortly afterwards, on the same day, his Honour having in the meanwhile communicated with the Lord Chancellor on the subject,

Mr. *Koe* made an application to his Lordship for directions to the Commissioner to execute the Order of the Court of Review, when the Lord Chancellor reserved his decision.

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Lincoln's Inn,
Feb. 16.

Lord LYNDHURST, C., now delivered his judgment as follows :—

I am of opinion that the Commissioner ought in this case to have executed the Order of the Court of Review; the Commissioners appointed under the act 1 & 2 Will. 4. c. 56 being bound to perform the same duties, as had been performed by the Commissioners previously to the passing of that act. It has been said, that the last-mentioned Commissioners executed the references made to them by the Lord Chancellor, not in their character of Commissioners, but as barristers, in the same way as barristers took the references of judges of assize (a). It is clear, however, from the form of

(a) See the statement of Mr. *Fonblanque*, in the note to *Ex parte Rolfe*, 3 M. & A. 320; 2 Dea. 436,

those references, and of the certificates made in pursuance of them, that such was not the case. [His Lordship then referred to the several Orders of reference, and the certificates of the Commissioners thereon, set out in the note below (a).] Now, in these Orders and reports there

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(a) The following are the Forms of the Certificates of the Commissioners, referred to by the Lord Chancellor. They were made upon the Orders in the cases mentioned in the note to *Ex parte Rolfe*, 3 M. & A. 316; 2 Deac. 433.

"In the matter of JOHN POOLEY KENSINGTON, EDWARD KENSINGTON, HENRY KENSINGTON, WILLIAM STYAN, and DANIEL ADAMS.

"To the Right Honourable the Lord High Chancellor of Great Britain.

"We, the major part of the Commissioners acting in the commission of bankruptcy, issued against the said *John Pooley Kensington, Edward Kensington, Henry Kensington, William Styant, and Daniel Adams*, humbly certify, that by an Order made by his Honour the Vice Chancellor of England, dated the 6th day of August 1819, and made upon the petition of," &c. "It was ordered, That it be referred to the Commissioners to inquire whether it was for the benefit of the creditors seeking relief under the said commission, that the copies of the accounts in question in the said petition mentioned should be delivered to the petitioners or their agent, having regard to the circumstance, that Mr. *Learnmouth* is for this purpose the agent of the petitioners. That, in pursuance of such Order, we, the major part of the Commissioners met for the purpose of proceeding upon the said inquiry, and at the request of Mr. *Ross*, as counsel for the assignees, we examined," &c. "We do therefore humbly certify, that as far as we are capable of forming any judgment upon the question referred to us, it will be for the benefit of the creditors that copies of these accounts should be delivered to the petitioners or their agent, we having had regard to the circumstance that Mr. *Learnmouth* is, for that purpose, the agent of the petitioners.

Certificate on a reference, as to the delivery of copies of accounts.

(Signed,)

J. BRAUCLERK,
J. WROTTELEY,
J. SPRANGER."

"In the matter of MATTHEW GARLAND, MOSES MAGNUS, and BENJAMIN BENJAMIN, bankrupts.

"To the Right Honourable the Lord High Chancellor of Great Britain. Whereas, by an Order bearing date the 28th day of August in the year of our Lord 1819, and made on the petition of *Charles Miller, Edward Scholefield, and James Bate*, your Lordship was pleased among other things to direct that it should be referred to the Commissioners named in the com-

Certificate on a reference, as to notice of acts of bankruptcy.

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is no mention whatever of their being made *by consent*; and it is clear, that they were not so made. As the Lord Chancellor, therefore, had no power to refer questions in dispute between parties to barristers, unless by the con-

mission against the said bankrupts, or the major part of them, to inquire and certify to the Court at what time any and what act or acts of bankruptcy was or were committed by the said bankrupts, or any or either of them, and what act or acts of bankruptcy were known to *Thomas Bennett*, the petitioning creditor in the said commission named, to have been so committed, and when known to him to have been so committed, and also to enquire and state to the Court at what time the said *Thomas Bennett* had a sufficient debt to support a commission of bankruptcy against the said bankrupts, and whether the said petitioners, or any or either of them, had at the time when such act or acts of bankruptcy, or either of them were committed, and now have, a sufficient debt to sustain a commission of bankruptcy against the said bankrupts, and whether the said petitioners, or any or either of them, had, at any and what time, notice and knowledge of such act or acts of bankruptcy; and that, for the purpose of making such inquiries, the said *Thomas Bennett*, and all such other parties as the said Commissioners, or the major part of them, should deem necessary, were to be severally examined before the said Commissioners, or the major part of them, upon interrogatories, or otherwise, touching the matters in question, as the said Commissioners, or the major part of them, should think fit, and should produce to the said Commissioners, or the major part of them, upon oath, all books, deeds, papers, and writings whatsoever in his or their respective custody or power relating thereto, as the said Commissioners should direct. Now we, whose names and seals are hereunto subscribed and set, being the major part of the Commissioners named in the said commission, do humbly certify to your Lordship, that, in obedience to the said Order, we have proceeded to make the inquiries thereby directed, and for the purpose of making such inquiries," &c. "And having considered the said examinations," &c. "And having also read and considered other examinations duly taken by us, or by the major part of the Commissioners named in the said commission, previously to the making of the said Order, and now remaining filed with our proceedings under the said commission, We, the said Commissioners, do further certify to your Lordship," &c. "In witness whereof, we have hereunto set our hands and seals, this," &c.

(L. S.)

A. C. IMPRY,

(L. S.)

M. F. AINSLIE,

(L. S.)

R. GRANT."

sent of the parties themselves, the circumstance of these references not being made *by consent*, establishes conclusively, that they were made to the Commissioners

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 Ex parte
 STEWARD.

In the matter of WILLIAM DUNN, a bankrupt.

Ex parte WILLIAM CHUBB.

Certificate on a
 reference, as to a
 new petitioning
 creditor's debt.

"To the Right Honourable the Lord High Chancellor of Great Britain.
 "We, whose names are hereunto subscribed, being the major part of the Commissioners named and authorized in and by a commission of bankrupt bearing date at Westminster the 17th day of May 1817, awarded and issued against the said *W. Dunn* of Hoxton in the county of Middlesex, wholesale upholsterer, cabiner maker, dealer and chapman, directed to us *John Beauclerk* and *Jefferies Spranger*, Esqs., and the Honourable *Charles Ewan Law*, together with *Henry Stebbing* and *Henry Wrottesley*, Esqs., do humbly certify to your Lordship, that, in pursuance of an Order of His Honour the Vice-Chancellor, bearing date on Wednesday the 22nd day of December 1819, whereby it was ordered that it should be referred to the Commissioners named in the said commission, or the major part, to inquire and state whether the petitioner *W. Chubb* has now a legal debt to support a commission against the said *W. Dunn*, and whether the said debt subsisted prior to the 20th day of July 1815, and for the better making the said inquiry," &c., "the major part of the said Commissioners having met at" &c., "on the 24th day of March 1820, and being attended" &c., "do find, by the examination of *W. Pearson* of" &c., "that *W. Chubb*, the petitioner in the said Order named, had, on the day of the date of the said Order, a legal debt to support a commission of bankrupt against the said *W. Dunn*, but we do further find that the said debt did not subsist prior to the said 20th day of July 1815; because, although a running account subsisted between the said petitioner and the said bankrupt from the 5th day of July 1814, to the 7th day of April 1817, upon which last mentioned account 100*l.* and upwards was always due to the petitioner, yet payments were made by the said bankrupt to the said petitioner subsequent to the said 20th day of July 1815, which exceed the amount of the debt which was due on the said 20th day of July 1815. Dated the 9th day of June 1820."

(Signed,)

J. BEAUCLEBK,
 J. SPRANGER,
 C. E. LAW.

14 March, 1821. "In the matter of THOMAS EASTMAN, a bankrupt.

Certificate on a
 reference, as to
 the existence of
 any joint estate.

"To the Right Honourable the Lord High Chancellor of Great Britain.
 "We, the undersigned, being the major part of the Commissioners named and authorized in and by a commission of bankrupt awarded and issued against *Thomas Eastman*, late of Clement's Lane, merchant, a bankrupt, do humbly certify to your Lordship, that, in obedience to an Order made in this matter, by his Honour the Vice-Chancellor on the 3rd day of August 1818,

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in their character of *Commissioners*, and not as *barristers* (a).

If the Commissioners refuse to execute the order of reference made by the Court of Review, I am not aware that I have any jurisdiction to compel them; although it is not to be doubted that such authority must reside somewhere (b). The Commissioners have suggested, that it is contrary to public policy (c) to call upon them to execute these Orders; but, with the greatest respect for the Commissioners, I must beg to differ entirely from them on this point, and his Honour the Chief Judge is of the same opinion with myself.

upon the petition of *Michael Bousfield*, whereby we were directed to inquire and state to his Honour, whether at the time of the bankruptcy of the said *Thomas Eastman* there was any joint estate of the said *Thomas Eastman* and *Duncan Hunter* in the said petition named, and of what it consisted: and by which we were authorized to state to his Honour any special circumstances which in the course of our inquiries and in our judgment we should think necessary for his Honour's information in this matter; we have proceeded to make inquiries and do humbly certify, that we have been attended by the solicitors for the several parties interested, and having examined witnesses upon oath, and perused certain documents laid before us touching the matters referred to us, do find," &c., "And we humbly certify to your Lordship that we are of opinion that there was not at the time of the bankruptcy of the said *Thomas Eastman*, and that there is not now, any joint estate of the said *Thomas Eastman* and *Duncan Hunter*, unless the proof of the debt of 461*l.* 12*s.* 6*d.*, so made under the said commission of *Robert Rainey* as aforesaid, can be considered to be joint estate.

(Signed,)

J. C. GOUGH.
G. D. COLLINGS,
P. STILL."

(a) It appears, upon the face of an Order of reference made by a judge of assize, and of the award in pursuance of such Order, that the proceedings, including the examination of witnesses, &c., are *by consent*. See the forms in *Watson on Awards*, 363, 374 (2nd edit.)

(b) *Quere*, does not such authority reside in the Court of Queen's Bench, which has the power to issue a *mandamus* to any person, or inferior Court, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which is consonant to right and justice? See 3 Bla. Com. ch. 7. p. 110.—E. E. D.

(c) See Mr. *Fonblanque's* statement, *ubi supra*.

A memorandum of the Lord Chancellor's opinion was entered in the Secretary's book as follows :

" Upon the application of Mr. *Koe*, stating that a Commissioner of Bankruptcy declined to execute an Order made by the Chief Judge of the Court of Review,

" The Lord Chancellor gave it as his decided opinion, that the reference ought to be executed by the Commissioner; that the reference is made to them, not as barristers, but as Commissioners appointed to act in the same way, in all cases, as the Commissioners appointed in Lord Eldon's time acted under such references. His Lordship considered that they were bound to act as required, but that he had no power to oblige them. In confirmation of his opinion, his Lordship referred to the references and forms of the former Orders, and the returns of the Commissioners."

1843.

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STEWART.

On the case being mentioned this day to the Court of Review,

'1844.
Feb. 20.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. made the following observations :—

Soon after my appointment to be a member of this Court, a question was suggested as to its jurisdiction to direct references to the Commissioners; and I learned with surprise, that references had been directed by the Court of Review to Mr. *Ayrton*, one of the Registrars of the Court, instead of the Commissioners. I thought, as I still think, that the Orders of reference ought to have been directed to the Commissioners, and not to Mr. *Ayrton*; not because I doubt the entire competency of that gentleman to perform such duties, for I believe him to be in all respects fully competent,—an opinion that is augmented and strengthened by daily experience of his

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STEWART.

ability and learning; but because I think the matter properly within the cognizance of the Commissioners, and not within the scope of the office of Registrar; nor, however willing he might be to undertake it, does it form any part of the duties of the Registrar. I acted accordingly. The London Commissioners however, it appears, entertained a different opinion, and while some executed Orders of reference made by me, and some did not, all of them agreed in theory. Some public inconvenience was felt in consequence. At last, this petition in the matter of *Blake* brought the question before me, in the shape of a complaint against one of the Commissioners for not having executed an Order of reference. Having considered the case, and referred to the late act (a), as well as to the act of the 1 & 2 Will. 4. c. 56., I felt that, even if disposed, I had no power to enforce the execution of Orders of reference by the Commissioners. I also did not see, the law standing as it now does, that the Lord Chancellor had any such power; yet feeling the importance of the question to the public, and to the Commissioners themselves,—as if they were wrong, their refusal to act might cause a forfeiture of their office (without the interference of parliament) by the ordinary course of law, by information, or *scire facias* (b), or otherwise,—and thinking of the subject with the most perfect respect for their offices, I took the liberty of requesting the Lord Chancellor to hear the petition, instead of myself, by reason of the much greater weight of his opinion. A few days ago his Lordship stated his opinion, which is entered in the Secretary's book, and which I will now read. (His Honour then read the above memorandum (c) from the Secretary's book.)

(a) 5 & 6 Vict. c. 122.

(b) The authorities referred to in 5 Com. Dig. tit. "Officer," (K. 2.) (K. 3.) (K. 11.) (K. 13.) seem to be in perfect accordance with this part of his Honour's judgment.—E. E. D.

(c) See *ante*, p. 411.

1843.

Ex parte SAMUEL RIDLEY and others.—In the matter
of EDWARD KNIGHT.—

Westminster,
Nov. 6.

THIS was a petition of various creditors of the bankrupt, for the payment of their respective dividends.

The fiat issued on the 9th June 1840.

On the 2nd December 1840 a first dividend of 8s. in the pound was declared, the amount of which had been duly paid to each of the petitioners.

On the 2nd June 1842, at a meeting of the Commissioners for the purpose of auditing the accounts of the assignees and declaring a further dividend, the accounts of the assignees were audited, and the Commissioners then found a balance of 409*l.* 3s. in the hands of the assignees to be divided, which sum was sufficient to pay the creditors who had that day proved their debts the amount of the former dividend, and also a further dividend of 1*s.* 1½*d.* in the pound upon their several debts; and the Commissioners then declared a final dividend of 1*s.* 1½*d.* in the pound.

In September 1842 the petitioner *Ridley* applied to Mr. *Mackey*, one of the assignees, for the payment of this dividend; but neither he, nor any of the petitioners, had yet been paid it.

On the 12th October 1842 a circular letter was sent by the solicitors of the assignees to the several creditors resident in or near London, who had proved under the fiat, to the following effect:

Where the Commissioners, at a meeting to audit the accounts of the assignees and declare a dividend, found a certain sum to be in the hands of the assignees, and declared a dividend accordingly; *semble* that each of the assignees is liable for the payment of the dividend, although the principal fund for that purpose had been received by and was then in the hands of only *one* of the assignees.

If an assignee objects to be so charged with money in the hands of his co-assignee, he should state his objection to the Commissioner at the audit, and not lie by, until a petition is presented for the payment of the dividend.

“ Wardrobe Place, Doctors’ Commons, 12th Oct. 1842.

“ *Re Wright*, a bankrupt.

“ Sir.—We beg to inform you, that a final dividend of 1*s.* 1½*d.* in the pound was declared under this estate

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~
Ex parte
RIDLEY
and others.

on the 15th June last, which still remains in the hands of Mr. *W. H. Mackey*, of Southampton, one of the assignees of the estate; and we are also directed by Mr. *W. H. Mackey* to inform you, that, upon application being made to him for the dividend on the amount of your debt, he will pay the same.

“ We are, Sir, your obedient servants,

“ *Newbon and Evans.*”

On the 14th October 1842, the petitioner, *Samuel Ridley*, accordingly applied to *Mackey* for the dividend due to him, but without effect; and on the 23rd October 1842, *Mackey* sent to the petitioner *Ridley* the following letter :

“ Mr. *Mackey* presents his compliments, and is sorry that a severe illness during the last week has prevented his attending to the dividend matter, *In re Wright*; but he begs to assure Mr. *Ridley*, that his dividend, as well as the others unpaid, will be remitted in a day or two, as soon as Mr. *M.* is able to look through the papers.

“ Saturday evening, October 23rd, 1842.”

The petition alleged, that *Ridley* had since frequently applied to *Mackey* for payment of his dividend, as well as to *Harding* the other assignee, without being able to obtain the payment of it.

On the 28th April 1843, the Commissioner in London, to whom the fiat had been transferred under the 5 & 6 Vict. c. 122., held a sitting in this matter for the purpose of auditing the accounts of the assignees; when *Mackey* was examined before the Commissioner, and at his request the Commissioner adjourned that sitting, for the purpose of enabling *Mackey* to make out and render an account of the monies in his hands in respect

of the dividend payable under the Order of the 2nd June 1842, or otherwise, on account of the bankrupt's estate, and which account *Mackey* undertook to render within three weeks. No sitting, however, nor any adjourned sitting, had since been held under the fiat. The petition alleged, that all the petitioners had severally demanded from both the assignees the dividend payable on their several debts, but had not been paid the same, or any part thereof.

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 Ex parte
 RIDLEY
 and others.

The prayer was, that the assignees might be ordered to pay to the several petitioners the amount of their respective dividend of 1s. 1½d. in the pound on their several debts, together with interest thereon at the rate of 5l. *per cent. per annum*, from the 2nd June 1842 to the time of payment, and also the costs of the application.

In answer to the petition, the assignee *Harding* made an affidavit, in which he stated that the bankrupt had carried on business at Southampton, in which neighbourhood all the persons indebted to the bankrupt also resided, as well as *Mackey*, the other assignee. That, with the exception of the sum of 30l. 19s. received by *Harding*, who resided in London, the whole of the bankrupt's estate was realized by *Mackey*. That the deponent, being unable to attend the meeting at Southampton on the 2nd June 1842, when the final dividend was declared, made an affidavit in the usual form, stating the whole amount of the monies of the bankrupt's estate which had come to his hands, and that he claimed to deduct from the above sum of 30l. 19s., the sum of 2l. 5s. for the expenses incurred by him in attending the first dividend meeting, which would leave a balance in his hands of 28l. 14s.; which affidavit was duly handed

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to the Commissioners, and filed with the proceedings. That the final dividend then declared was payable out of the above mentioned sum of 409*l.* 3*s.*, found to be in the hands of *Mackey*, and the sum of 28*l.* 14*s.* in the hands of the deponent; from which last mentioned sum, however, the deponent claimed to deduct the amount of the dividend due on his own debt. That, some delay having taken place in the remittance by *Mackey* of the final dividend to the London creditors, the deponent caused his solicitors to write to *Mackey* on the subject; and that, a further delay having occurred, the deponent repeatedly wrote himself to *Mackey*, and caused numerous other letters to be written also by his solicitors complaining of the delay; to which applications *Mackey* returned excuses, but always alleged that he was forthwith going to remit the required amount; and, in a letter in reply to a further and peremptory application, he desired that the creditors might be referred to him at Southampton, and that, on their application, he would at once pay them their dividends. In pursuance of this last mentioned letter, the deponent instructed his solicitors to write the circular letter of the 12th October 1842, as stated in the petition, informing the creditors that the money for the payment of their dividends was in the hands of *Mackey*, and that they might receive their dividends on application to him. The deponent, having received further applications from several creditors complaining still of the non-payment of the dividend, repeatedly and urgently required *Mackey*, but without success, to satisfy the creditors; and he then submitted, that, having thus used his best endeavours to obtain the money from *Mackey*, the non-payment of the dividend had not arisen from any neglect or default of his own.

At the audit meeting before the Commissioner on the 28th April 1843, the deponent paid over the above sum of 30*l.* 19*s.*, after deducting the sum of 2*l.* 5*s.*, and also the amount of the final dividend due to the deponent in respect of his own debt, into the hands of the official assignee.

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Mr. *Swanston*, and Mr. *Barber*, in support of the petition. The defence, which it is understood is to be made to this petition on the part of the assignee *Harding*, is, that the fund came to the hands of *Mackey*, the other assignee, and that he has a right to deduct from the fund which came to his own hands, a certain sum for expences incurred by him, and for his own dividend. But *Harding* was well aware that the principal fund for the payment of the dividend was in the hands of *Mackey*, and is liable for such dividend to the creditors, in his character of co-assignee.

Mr. *Bacon* appeared for the respondent *Harding*. Although an assignee is liable to the creditors for the payment of a dividend, he is merely so liable, in the character of a trustee, and is not chargeable more than any other trustee, nor liable for more than actually comes to his hands. This doctrine is clearly laid down by Lord *Hardwicke* in *Primrose v. Bromley* (a), where he says, that "assignees are to be considered in this Court as mere trustees, and each separately answerable only for what they receive, and it would be of dangerous consequence to hold them otherwise." *Harding* therefore, having obeyed the order of the Commissioner at the meeting of the 28th April 1843, and having paid over the balance in his hands to the official assignee, cannot now be charged with the payment

(a) 1 Atk. 89.

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of dividends which were payable by *Mackey*, and for the non-payment of which *Mackey* is only to blame. The chargeability of the assignees in the present case is controlled by the order of the Commissioner, which directed one of the assignees, who had the smaller sum in his hands, to pay it over to the official assignee, and gave time to *Mackey*, the other assignee, to render an account of the monies in his hands, which formed the principal fund for the payment of the dividend. [The *Chief Judge*. Would that have been an answer to an action at law against the assignees, before the passing of the act of parliament, which took away the creditor's right of action for a dividend?] Perhaps not; but it would have been ground for an application to a Court of Equity to stay the action. In the present case, it is submitted that the order for the payment of the dividend should be made separately against *Mackey*. [The *Chief Judge*. Suppose even the case of ordinary trustees, where the receipt of one would not bind the other, yet, if the other, with knowledge of that receipt, permits an unreasonable time to elapse before he takes any proceeding against his co-trustee, what then would be his liability?] Here we submit, that no unreasonable time had elapsed, before *Harding* used every exertion to induce *Mackey* to pay the dividend; and on the 28th April last, even further time is given to him by the Commissioner for this purpose. A second audit was then taken of the accounts of the assignees, and a fresh order then made as to the money in the hands of each.

Mr. *Swanston*, in reply. The two sums in the hands of both the assignees form together an integral part of a trust fund, for which the assignees are jointly liable. [The *Chief Judge*. I suppose you do not maintain the

simple abstract proposition, that the receipt of one charges both.] I do not contend that *Harding* was so chargeable on the 1st June 1842. But on the 2nd June, when the meeting of the Commissioners took place for auditing the accounts of the assignees and declaring the dividend, *Harding* attended the meeting by his solicitor, and on that audit three sums were found by the Commissioners to be in the hands of the two assignees which form an aggregate sum. There were also monies received by persons, who could only be considered as agents of both. If *Harding* wished to protect himself from his joint liability, he ought on that occasion to have applied to the Commissioners to make a special order, charging *Mackey* only. But what does he afterwards do? He causes several letters to be written to *Mackey*, complaining of his delay in not paying the dividend. That course of proceeding shews that he considered himself jointly liable for the payment of it.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—There may possibly be in this case circumstances subsequent depriving *Harding* of that defence, of which he might originally have availed himself. The proceeding, which took place at the meeting before the Commissioner on the 28th April last, I do not think material to the question now before the Court, except that if *Harding* has paid over money by the Order of the Commissioner, he is not liable to pay it a second time. I consider, that *Harding* is liable for the payment of these dividends, by reason of the finding of the Commissioners (at the meeting of the 2nd June 1842) of a sufficient fund being then in the hands of the assignees for that purpose, and by reason of this finding being in

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the presence of *Harding's* professional adviser. If he objected to be so charged, he should then have stated his objection, or, at any rate, he should have come to this Court before October 1843, and not have lain by, until a petition was presented against him for payment of the dividend. But whether *Harding* is liable, or not, I think, taking into consideration the whole circumstances of the case, that the Order ought to be made against *Mackey* in the first instance. Let *Mackey*, therefore, on or before the 27th November inst., pay to the petitioners respectively the amount of the dividend on the several debts, which they have respectively proved under the fiat, together with interest from the Order of dividend. It will be the common Order, with costs, against *Mackey*, as if he were sole assignee; reserving all questions as to the liability of *Harding*, if any; with liberty for either party to apply.

Westminster,
Nov. 13, 22,
23, and 24;
and Dec. 6.

Ex parte JAMES HENRY VEYSEY.—In the matter of
WILLIAM HENDERSON and of JAMES HENRY VEYSEY.

1. A petition to annul a joint fiat, presented by one of the bankrupts, must be served upon the other, although it only seeks to annul the fiat as regards the petitioner.

THIS was the petition of one of the bankrupts to annul the fiat, for want of the legal requisites.

The bankrupts had carried on business in partnership at Bristol, as manufacturing chemists at certain works,

2. Where the objection arising from the want of such service was taken by the Court, and the petition was re-answered, that it might be served upon the other bankrupt, but before it was so re-answered and served, the time prescribed by the 5 & 6 Vict. c. 122. s. 24. for taking proceedings to dispute the fiat had run out; *Held*, that the Court had jurisdiction to entertain the petition, and to direct the assignees to admit, in an action brought against them by the bankrupt, that the action was commenced within the time prescribed by the act.

3. *Held*, that, in such an action, the bankrupt ought to be confined to such objections to the fiat, as he would have been entitled to make, under his petition; and that leave ought not to be given to him to amend the petition by introducing a statement, which, with reasonable diligence, might have been introduced into it originally.

4. *Quere*, whether the Court can give validity to a fiat, by annulling it as to one of the bankrupts, against whom it cannot be supported for want of the legal requisites.

5. *Quere*, whether rent covenanted to be paid, by a lease made during the trading, but falling due after the trading has ceased, can constitute a good petitioning creditor's debt.

called the Netham Works, which were the property of the bankrupt *Henderson*, subject to a mortgage for 2000*l.* to one *Zaccheus Hunter*, the petitioning creditor in the present fiat. The works were held by the partnership under a lease for seven years, from the 28th of December 1838, granted by the mortgagee to the bankrupts, at a rent of 200*l.* a year, payable quarterly, with the usual covenants, including a joint and several covenant for payment of the rent.

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The partnership had been dissolved on the 6th of March 1843, upon the terms expressed in a deed of dissolution, whereby all the partnership property was assigned to the petitioner, who covenanted to pay the debts of the concern. This, however, according to the affidavit of the petitioner, was merely an arrangement for winding up the concern, the petitioner not intending to continue the business after the dissolution, but intending to retire from trade altogether. The petitioner also deposed, that the manufactory was never opened for the purpose of trade, after the 6th of March, and that on the 20th of March all the effects of the partnership were put up for sale by auction, and the greater part sold. The remainder were left in the hands of the auctioneer to be disposed of.

On the 15th of June the petitioner left England, and went to reside at Havre de Grace, for the benefit (as he alleged by his affidavit) of his health.

The rent of the manufactory had been paid up to Christmas 1842, but no rent had been since paid. The petitioner had, however, paid the property tax up to March 1843, in respect of the premises, but this circumstance was not stated in the petition.

On the 10th of July 1843 the present fiat was issued, the petitioning creditor's debt being the arrears of rent,

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due to *Hunter* under the covenants in the lease, and the act of bankruptcy relied upon, at the opening of the fiat, being the bankrupt's going abroad. The adjudication took place on the 13th of July, and notice of it had been served on the petitioner, by a duplicate being affixed the same day to the door of his then late residence.

The grounds on which it was sought to annul the fiat were, that as to the 50*l.* due for rent accruing due at Midsummer, it did not accrue due till after the trading had ceased, and the stock had been sold off; and that as to the 50*l.* for rent due on the preceding Lady Day, it was open to the same objection, not having fallen due till after the bankrupt had ceased to buy any goods for the purpose of selling them again, nor till after the trade premises were closed; nearly all the goods having been then sold, and the remainder being in the hands of the auctioneer for sale, at prime cost, without the petitioner intending to interfere in the sales, or to gain any profit upon them. It was also contended, that no act of bankruptcy had been committed.

November 13.

On the petition coming on to be heard on this day, it appeared that the bankrupt *Henderson* had not been served.

The COURT thought the petition could not be heard, without being served upon *Henderson*.

Mr. *Swanston*, and Mr. *W. M. James*, in support of the petition, asked for leave to amend the petition, by praying that the fiat might be annulled as against *Veysey* only, so as to avoid the necessity of serving *Henderson*.

The CHIEF JUDGE said, that, even if the petition were so amended, *Henderson* must still be served; that, if the fiat were annulled against one of the bankrupts, its vali-

dity might be affected as regarded the other, who must have an opportunity of being heard upon the question.

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Mr. *Swanston*. The act (a) provides, "that in every commission against two or more persons, it shall be lawful for the Lord Chancellor to supersede such commission as to one or more of such persons, and the validity of such commission shall not be thereby affected as to any person against whom such commission is not ordered to be superseded, nor shall any such person's certificate be thereby affected."

The CHIEF JUDGE. But has it not been understood, that the commissions meant in that section are commissions originally valid, and not commissions, which are supersedable for want of the legal requisites as to one of the partners?

Mr. *Swanston*. There has been some difference of opinion upon that point. In *Ex parte Bygrave* (b), it was argued that the statute 3 Geo. 4. c. 74., (which is a similar enactment to that contained in the 16th section of 6 Geo. 4. c. 16.) only applied, when the commission was valid in its concoction, and did not enable the Court to give validity to a commission which was originally invalid. Sir *John Leach*, however, thought otherwise, and annulled the commission against one of the bankrupts who had not committed an act of bankruptcy, without prejudice to the validity of the commission against the other bankrupt. But it must be admitted, that in *Ex parte Wray* (c) the Vice-Chancellor seems to have attended to the objection, although he had previously, in the matter of *Coleman* (d), acted upon the

(a) 6 Geo. 4. c. 16. s. 16.

(c) Mont. & M'Ar. 195.

(b) 1 G. & J. 391.

(d) Ibid. 15.

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authority of *Ex parte Bygrave*. And since the institution of the Court of Review, a case has occurred, in which that Court thought it could not give validity to an invalid fiat, by annulling it as against one of the bankrupts (a). The safer way would therefore be, undoubtedly, to serve the other bankrupt, were it not for another difficulty, which is, that the petition must be re-answered, and that a question will then arise, whether it has been presented within the time limited by the 5 & 6 Vict. c. 122. s. 24 (b), the Lord Chancellor having decided, that that section of the Act has taken away the discretionary power of the Court to annul a fiat, after the time therein limited has elapsed. We must therefore, to avoid if possible raising that question, ask for your Honour's decision, as to the jurisdiction of the Court to annul the fiat as against the petitioner only.

The CHIEF JUDGE. I cannot decide that question in the absence of the other bankrupt. The petition must therefore be re-answered, and stand over, in order that the other bankrupt may be served.

November 22. *Henderson* having been accordingly served, the petition came on again this day.

Mr. *Swanston*, and Mr. *W. M. James*, in support of the petition.

Mr. *Russell*, and Mr. *Tripp*, for the petitioning creditor, took the preliminary objection, that the petition came too late, under the 5 & 6 Vict. c. 122. s. 24. No "proceeding" was taken by the petitioner, within the meaning of the Act, until the petition had been served upon all the parties upon whom it was necessary to serve

(a) See *Ex parte Clarke*, 1 D. & C. 544.

(b) See Appendix, p. 1.

it. Merely presenting a petition, without serving it on the proper parties, cannot be a proceeding for the purposes of the act. Now the adjudication took place on the 13th of July, and the advertisement was published on the 21st, from which period more than three months elapsed, before the petition was served on the other bankrupt, the petitioner having been in Europe all the while. The case therefore falls completely within the words of the section, which, the Lord Chancellor has decided, must be construed literally. If merely presenting the petition be held to be "a proceeding," within the meaning of the act, still it has not been prosecuted with "due diligence and with effect."

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Mr. *Wigram*, for the assignees.

Mr. *Swanston*, and Mr. *W. M. James*, were not called upon to address the Court upon the preliminary objection.

The CHIEF JUDGE. The Act of Parliament, after providing that the advertisement shall not appear till notice of the adjudication has been served upon the bankrupt, or left at his usual place of abode, or of business, provides, that unless he, within certain specified times, commences some proceeding to dispute or annul the fiat, and prosecutes the same with due diligence and *with effect*, the advertisement shall be conclusive evidence of the bankruptcy. Under this section therefore, as it has been construed by higher authority than mine, although a man may be lawfully, reasonably, and properly absent from his place of abode and place of business, and may be so situated as not to know of the fiat, the adjudication, or the service of the adjudication, or be capable of receiving intelligence of either, he may, whether lay or clerical, whether a trader or not a trader, be irrevocably

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and irretrievably bankrupt, without the slightest want of morality, prudence, or even of regularity or attention on his part, and although he may not have committed an act of bankruptcy, and may have ample assets far beyond all his debts. These considerations certainly weighed very strongly with me in a former case, in which I conceived that this Court might, and, if able, ought to construe the section, as not extending to the discretionary power of the Court of Review to annul a fiat; especially as the words "and shall not have prosecuted the same with due diligence and with effect," can scarcely be interpreted literally and grammatically; and as the criminal sections are such as they are. But the Lord Chancellor considered, and has, as I understand, settled, that the discretionary jurisdiction of this Court is taken away by the words of the act, in the cases to which those words apply, and that, therefore, however rigid the requisitions of the act may be, that is a matter for the consideration of the legislature, and not of a court of justice. Being unable to say that there has in the present case been any absence of due diligence, the petition having been served, within the time prescribed by the act, upon all the parties, except the other bankrupt, upon whom the petition has now been served, in consequence of an objection taken by the Court, I consider myself authorized to say, that every thing has been done which the statute requires, and that this objection must therefore be overruled: a decision which I consider to be in letter and spirit consistent with that of the Lord Chancellor.

Mr. *Swanston*, and Mr. *W. M. James*, in support of the petition. There was no debt, which accrued due during the trading, sufficient to support this fiat. It will be contended on the other side, that, as the covenant to

pay was entered into before the trading ceased, the debt may be considered as incurred before that time. But there is no foundation for such a proposition; for the contract is to pay the rent, in consideration of the occupation; there is, therefore, no debt, until after the occupation, in respect of which the rent is paid. The rent is part of the profits of the land, and the right to demand the landowner's share does not arise, until the profits have accrued (a); *Auriol v. Mills* (b); *Utterson v. Vernon* (c). It is quite settled, in bankruptcy, that a landlord cannot prove for future rent (d). The rent for the quarter ending at Midsummer may be laid out of the question; for it cannot be pretended, that, when that became due, any trade was carried on, and, besides, the act of bankruptcy relied upon is alleged to have been committed on June 15th. Now it is settled, that the petitioning creditor's debt must be incurred before the commission of the act of bankruptcy. As to the rent for the quarter ending at Lady Day, we submit, that selling off the remaining stock in hand, after retirement from business, is not a trading. In *Cotton v. Daintry* (e), the Court held that the selling of merchandize, which were the effects of a former trading, and which could not be put off immediately on ceasing to trade, would not make a man a trader. [The *Chief Judge*. Is not that Sir *Anthony Bateman's* case, the decision in which was afterwards reversed?] The bankruptcy appears (in another part of the same volume (f)) to have been afterwards upheld; but, in the latter report, the Court appears to have relied upon a fact, there noticed for the first time, that Sir *Anthony Bateman*, having goods by him, showed

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(a) Co. Litt. 141.

(b) 4 T. R. 94.

(c) 4 T. R. 570.

(d) Cullen, 145.

(e) Ventris, 29; 1 Siderf. 166.

(f) Ventris, 166.

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them to several, and obtained the loan of divers sums of money upon the credit of them. No such case is attempted here to be made out. In *Ex parte Cundy (a)*, Lord *Eldon* left it to a jury to ascertain, whether at the time the petitioning creditor's debt was contracted, there was any intention of resuming the business. Now, in this case, it is clear from the evidence, that such an inquiry must be answered in the negative. [The *Chief Judge*. A man buys and sells, with intention to trade, and to make a profit; the question is, whether if, after ceasing to buy, he continues to sell goods, that is not a trading *(b)*.] We submit it cannot, according to the authorities, be so held. They also now brought forward the fact of the payment of the property tax, and contended that it was a payment in part of the rent, and reduced the debt below the requisite amount.

The CHIEF JUDGE. This does not appear to me a case, in which I ought to annul the fiat, without the question of its legal validity being decided by a court of law. The future observations may be therefore confined to the single point, whether I ought to give the petitioner an opportunity of making out his case at law, with such admissions as may be requisite.

(a) 2 Ro. 357.

(b) There are three cases, which may be cited in support of the affirmative of this proposition. In *Rawlinson v. Pearson*, 5 B. & Ald. 124, a pawnbroker, who had given over taking in goods, but continued to sell the unredeemed pledges, was held still to be a trader. In *Wharen v. Routledge*, 5 Esp. 255, a manufacturer, who ceased to manufacture more goods, was held not to lose the character of a trader, if he continued to sell those already manufactured. And in *Backhouse v. Tarleton*, 2 Star. Evid. 143, where a partnership between two merchants had been dissolved some years, and no act of trading had been done for two years before the petitioning creditor's debt accrued, but the concern had not been ultimately wound up, and part of the stock still remained in their warehouse undisposed of, the trading in this case was held to be continued.—E. E. D.

Mr. *Russell*, and Mr. *Tripp*, contended that the 24th section of the new act prevented the petitioner from disputing the fiat at law, and that the Court of Review had no jurisdiction to place him, by means of admissions on the part of the assignees, in a better situation than that in which he was left by the act.

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VICE-CHANCELLOR KNIGHT BRUCE, C.J.—If this case had come before me, independently of any question upon the new statute,—considering the nature of the questions of law and fact which are raised, and the peculiar circumstances of the case,—my course would have been to allow the petition to stand over, with liberty for the bankrupt to bring such action as he might be advised; and I should have been ready to listen to any application as to the proper admissions to be made. The question is this, therefore, how far ought that course to be altered, or affected, by the provisions of the new act? Upon the preliminary question, I have already expressed it as my opinion, and I adhere to it, that the circumstance of this petition standing over at the suggestion of the Court, in order that the other bankrupt might be served, does not prevent the petition from being “a proceeding” to annul the fiat, taken in proper time, and prosecuted with due diligence. That question, if it be thought proper, may be carried before the Lord Chancellor.

Setting that difficulty aside, the next question is, whether, thinking, as I do, that the case demands the assistance of a court of law and of a jury, I am precluded by the terms of the 24th section of the act from receiving that assistance. If I merely directed the petition to stand over, with liberty for the petitioner to bring an action, the object might not be attained, as the statute might

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operate as a bar. And it is said, that in any event, such an action must fail. I am not of that opinion; I think an action emanating from this Court will be a part of this proceeding, which, as I have said, I consider to have been regularly commenced within the prescribed time. I shall therefore direct this petition to stand over, with liberty for the petitioner to bring an action; and if the action shall be brought within a short time, to be limited by the Order, the assignees must admit that the action was commenced within three months after the advertisement, and was subsequently prosecuted with due diligence. I do not add "with effect." The petitioner must admit the execution of the lease by all parties, and must also admit the fiat, the adjudication, and the appointment of assignees; and the assignees must admit the possession of goods; and all parties must have liberty to apply. If the case were unaffected by the act of the 5 & 6 Vict. c. 122., the bankrupt might avail himself of all legal objections to the fiat. I am at present inclined, under the circumstances of the case, considering the proceedings to have been taken in due time, not to prevent the petitioner from questioning the validity of the fiat on any legal ground, whether taken by his petition or not. But this point requires consideration, with reference to the Lord Chancellor's decision, and I will consider it farther before disposing of it.

*November 24.* On the case being mentioned, on this day, with reference to the range of objection to be allowed to the petitioner in the action which he was to be at liberty to bring,

The CHIEF JUDGE said, that according to the old

practice, when the bankrupt presented a petition to supersede, and the Court did not think the case clear, it ordered the petition to stand over, with liberty to bring an action, in which the bankrupt might take any objection whatever. In the present instance, however, time would be a bar, without the special direction of the Court; and the question was, whether a greater range ought to be allowed to the petitioner in the action, than he would have been entitled to under his petition. His Honour wished to hear the following questions discussed:—Whether the range of objection was positively cut down by the act, and if not, whether the discretion of the Court ought to be exercised, in any and what manner, in cutting down the range of objection; whether the range of objection should be greater in the action than in the petition, and if not, whether leave ought to be given to amend the petition, by introducing a statement with reference to the payment of the property tax, and whether, having regard to the petitioner's knowledge on the subject when the petition was presented, its omission was consistent with due diligence.

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Counsel were heard on this day, on the points reserved. *December 6.*

The CHIEF JUDGE.—I have reconsidered this case, and still think the petitioner is entitled to an admission that the action was commenced in due time. But, the action being directed by me on the merits of the petition, can I direct it to be prosecuted with the same advantages as if it were commenced simultaneously with the proceeding by petition, without confining it to the range of the petition? I am of opinion, that, consistently

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with the Lord Chancellor's construction of the act, I cannot allow the action to go beyond the range of the issues raised by the petition.

By the Order the petitioner was to be at liberty to bring an action of trover against the creditors' assignee, as defendant, the action to be commenced within ten days, and the declaration to be delivered within fifteen days. The execution of the lease and counterpart was to be admitted on both sides, and those instruments were to be produced at the trial. The petitioner was to admit, that a fiat issued against him and *Henderson*, dated 10th July 1843, and that both were adjudicated bankrupts thereunder, and that assignees were duly appointed; and the defendant was to admit at the trial, that the action was commenced within three months after the advertisement in the Gazette of the adjudication, and was subsequently proceeded with, with due diligence, and that possession had been taken under the fiat, and he was also to admit a conversion, and the petitioner was to take no objection on the ground of want of evidence of *Henderson* having been a trader, or having committed an act of bankruptcy. And the petitioner was to admit, that on March 25th, 1843, one quarter's rent, amounting to 50*l.*, became due from the petitioner to the petitioning creditor, in respect of the rent reserved by the lease, and that, on June 24th 1843, another quarter's rent became due; and the petitioner was not to set up any payment made in respect of the tax upon property, or income, or otherwise, in diminution of such quarterly sums in respect of rent, or by way of set-off against the same. And the defendant was not to set up any other petitioning creditor's debt than the sums so due for rent under the lease.

Ex parte JOHN WILLIAMS and JOHN OGDEN BACCHUS,
—In the matter of JOHN OLIVER, JOHN YORK, and
RICHARD HARRISON.

1843.

Westminster.
Nov. 15 and 24,
and
Lincoln's Inn,
Dec. 11.

THIS was a petition to expunge a proof for 10,543*l.* 10*s.* 4*d.*, which had been admitted against the joint estate, on behalf of the estate of two of the partners, who had carried on a separate trade.

The three bankrupts carried on business in partnership, as coal and iron masters at Tipton, in Staffordshire, under the style of the Horseley Coal and Iron Company. The two bankrupts, *Oliver* and *York*, carried on a separate business as bankers at Stoney Stratford, and had, with other partners constituting the then banking firm, been formerly the bankers of the Horseley Coal and Iron Company, but had long before the year 1840 ceased to be their bankers, and the Dudley and West Bromwich Bank were and continued to be the regular bankers of the Horseley Company up to the bankruptcy. In the beginning of 1840, the Dudley and West Bromwich Banking Company pressed the Horseley Company to reduce the balance of their account, which was considerably overdrawn; and in consequence of this request, 5000*l.* was, on the 9th of March 1840, paid by Messrs. *Oliver* and *York* to the credit of the Dudley and West Bromwich Banking Company, with directions for the amount to be placed by that company to the credit of the Horseley Company. As a security for the repayment of this amount to *Oliver* and *York*, *York*, as a member of and in the name of the Horseley Company, on the 7th of March 1840 made two promissory notes, for 2500*l.* each, in favour of *Oliver*

Two of the members of an iron company carry on a distinct trade as bankers, but are not the ordinary bankers of the company. They make advances, at interest, to the company, for the purpose of relieving it when it is in a state of difficulty and pressure, and without taking or asking for any security, and under such circumstances as to lead to the inference that the advances would not have been made, had not the bankers been partners in the iron company. On the company becoming bankrupt, and there being no evidence, except such as was furnished by the nature of the transaction itself, that the character of a banking transaction belonged to it,—*Held*, that the advances, though made in fact by bankers, were

not made by them in their character of bankers, and were not consequently dealings between trade and trade, giving a right of proof against the estate of the company; the use of the facilities afforded by a trade, not being necessarily a use of them in the trade itself.

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and *York*. These notes were not paid, but were renewed from time to time, and at the bankruptcy the renewed notes were in the hands of the assignees of *Oliver* and *York*. On the 27th of June 1840, the Dudley and Bromwich Banking Company pressed for a further reduction of the amount by which the Horseley Company's account with them was overdrawn, whereupon *Oliver* and *York* advanced 2000*l.* more out of monies belonging to them in the hands of their broker. Upon this occasion, a Mr. *Gandell*, who was then a partner in the Horseley Company, wrote the following letter to Mr. *Oliver*.

" London, June 27, 1840.

" My dear Sir.—I have received the 2000*l.* from Messrs. *Overend & Co.*, and paid the same into *Williams's* for the Dudley Bank. I will make every exertion to enable the Horseley Company to repay your advances for them, and I hope better days are in store for us."

On the 10th of July 1840, the managing clerk and cashier of the Horseley Company wrote the following letter to Messrs. *Oliver* and *York*.

" Horseley Iron Works, 10th July, 1840.

" Gentlemen.—Enclosed you will receive two bills, in lieu of those which became due on the 10th April and 10th May, which you were kind enough to let stand over. I sincerely hope we shall be in a much better position, when the present ones are at maturity. Mr. *Gandell* was here on Tuesday and Wednesday, and requested me to say, that if you will send him word what interest is due, he will pay it to you."

On the 11th of July, the three bankrupts executed a bond to the Dudley Banking Company to secure any sums not exceeding 8000*l.*, which might on a balance

of accounts from time to time be due from the Horseley Company to the Dudley Banking Company.

On the 13th September 1840, the managing clerk of the Horseley Company sent the following letter to Mr. *Oliver*.

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“ West Bromwich, 13th September, 1840.

“ Dear Sir.—I received this morning only from Mr. *York* his letter of the 11th, returning me the bills which I sent for his signature. In giving him a list of the bills, I did not include the 2000*l.* which Mr. *Gandell* received of you, and which ought to have been paid to you ere this; but I am not unmindful that the Horseley Company owe it you, and I will make every exertion in my power to get in the outstanding debts to meet all the engagements.”

On the 12th of November 1840, *Oliver* and *York* advanced to the Horseley Company a further sum of 2000*l.* out of monies in the hands of their broker, and Mr. *Oliver* received an acknowledgment from Mr. *Gandell* in a letter containing the following passages. “ I have received the 2000*l.* from *Gurney & Co.*, and paid the same into *Williams* and Co. for the Dudley Bank; the amount shall be repaid out of the first monies that come to my hands; and am I to pay it to *Jones, Lloyd & Co.*?”—“ If you are not almost mad, I am; I would rather go through the Gazette, than endure much longer the anguish of mind I have experienced for some months past; and this will be the fate of us all, unless there be unity and exertion amongst those who have a stake in the concern. I have not been able to get the money from the North Midland Company, nor any satisfactory answer from the secretary to my repeated applications for the certified amount by Mr. *R. Stephen-*

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son."—"I do assure you that I truly feel the peculiar hardship of your and Mr. *York's* situation, and will do all in my power to protect your interests in our unfortunate concern."

On the 27th November 1840, *Gandell* received 2060*l.* from the North Midland Company, and paid it to the credit of *Oliver* and *York*.

On the 4th December 1840, a further loan of 2000*l.* was made by *Oliver* and *York* to the Horseley Company.

In September 1841, a statement of the interest and banker's commission due to *Oliver* and *York* on the bills and advances, was sent to the managing clerk of the Horseley Company, who remitted a bill for the amount in a letter containing the following passage: "I enclose a bill at one month as requested, dated 4th instant, for amount of discount and interest 429*l.* 11*s.* 9*d.* The bank account on Saturday, after debiting the bills due on that day and the draw for the pay, was 7400*l.*; I will make every exertion to have it cleared off by the next quarter day."

On the 2nd of May 1842, *Oliver* and *York* made a further advance of 450*l.* to the Horseley Company; and, having afterwards discounted a bill for 1000*l.* accepted by one *Barnes* and indorsed by the Horseley Company, they received, in April 1843, from the managing clerk of the Horseley Company a letter addressed to Mr. *Oliver*, and containing the following passage, "I have particularly to request that you will not present the bill you hold of Mr. *Barnes's*, which is due on the 17th; I will send you all I can towards it by Friday's post, and will make every exertion to give you the remainder next week."

The sum of 250*l.*, towards payment of this bill, was

remitted by the managing clerk of the Horseley Company to Mr. *Oliver*, but the remainder continued unpaid.

The fiat against *Oliver* and *York* issued on the 19th May 1843, and the fiat against all the three bankrupts issued on the 31st of May.

The petitioners were appointed assignees under the latter fiat, and the respondents under the former.

At a meeting held under the fiat against the three bankrupts, the official assignee under the fiat against the two tendered a proof for 10,543*l.* 10*s.* 4*d.*, as due to them on balance of account for monies lent and advanced by *Oliver* and *York*, as bankers, and for interest, discount, commission, and expenses charged by them according to the custom of bankers. The proof was opposed on behalf of the assignees of the three, but was admitted by the Commissioner, from whose decision this petition was an appeal.

The principal items in the account on which this balance arose were those, the particulars of which have been above stated; what was the nature of the others did not distinctly appear.

Mr. *Russell*, and Mr. *Rolt*, in support of the petition. Nov. 15 and 24.

The case is decided by the authority of *Ex parte Silktoe* (a). The only distinction, that can be attempted to be made, must be founded on the circumstance of the partners who made the advances happening to be bankers. But it is not suggested, that the iron company were customers of Messrs. *Oliver* and *York*, as bankers, nor that any banking account subsisted between the two firms. Moreover, it is no part of the business of bankers to lend money, without security, to a sinking firm. The proper

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(a) 1 G. & J. 374.

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business of a banker is, to receive other men's monies into his custody, and to make advances to those who deal with him as customers. Even laying out the monies which he has in his hands upon securities, though perhaps incidental to his business, forms no part of it. He does not make such investments as a banker. But, at all events, advancing money, without security, to an insolvent firm, cannot be regarded as a banking transaction. The customers of a bank do not deposit their money, with the notion that it will be invested in iron works or other speculations. That the advances here were not made by Messrs. *Oliver and York*, as bankers, is apparent from the correspondence in the case, in which the assistance rendered is sought from and given by them, on account of their being members of the iron company.

Mr. *Swanston*, and Mr. *Montagu Chambers*, *contrâ*. The single question in the case is this: did the dealings here take place between trade and trade, or between the partners and the firm only? That was the way in which the question was put by Lord *Eldon* in *Ex parte Sillitoe (a)*, the authority of which we do not dispute. In that case, the smaller firm, who made the advance to the larger, were ironmongers; and it could not be said that an advance of money was a dealing in the trade of an ironmonger; but if they had supplied ironmongery to the larger firm, they would, according to the principles laid down by Lord *Eldon*, have been entitled to prove. In the present case, the advance is made by bankers, whose business it is to advance money. In fact, *Ex parte Sillitoe* was the exact reverse of this case; there dealers in iron made an advance to bankers,—here bankers make an advance to an

iron company. And the distinction was expressly taken by Sir *J. Leach* in the cases of *Ex parte Castell* (a), *Ex parte Brenchley* (b), and *Ex parte Stroud* (c), all of which were decided after *Ex parte Sillitoe*, and are direct authorities in our favour. Sir *John Leach* said of these cases, "Consistently with every principle stated in the case of *Ex parte Sillitoe*, it does appear to me, in all the three cases in question, the one firm is entitled to prove against the other firm. In the case of *Ex parte Brenchley*, the banking firm, consisting of three, claim to prove against the distilling firm, consisting of two, for advances of money made by the bankers to the distillers; one of the distillers is not a partner in the banking firm, and if he had been, *the advance of money by the bankers is a dealing in the way of their trade*. In the case of *Ex parte Stroud*, the debt due by the minor firm to the larger firm was, in respect of the employment of the surplus monies which the larger firm had in their hands as bankers; *the profit of a banker is made by the employment of such surplus monies*, and the debt is therefore to be considered due to them in respect of a *dealing in their trade*. The case of *Ex parte Castell* is to be referred to the same principle. The dealing of the one firm with the other was in the way of their trade." The dealing in this last case was between two banking firms, the one consisting of all the partners in the other with one additional partner. The present case therefore is concluded by authority. [The *Chief Judge*. If *Oliver and York* had continued to be the bankers of the *Horseley Company*, it is not argued on the other side, that the proof would be wrong.] But the argument must go to that extent, or it must fail altogether; for the application of

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(a) 2 G. & J. 124.

(b) *Id.* 127.

(c) *Ibid.*

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the principle cannot depend upon the circumstance of the banking transaction being an isolated one, or of the parties who deal with certain bankers upon one occasion dealing with other bankers upon other occasions. [The *Chief Judge*. But, under the circumstances of the case, would not the advance have been made, if the distinct trade of *Oliver* and *York* had been any other than that of bankers,—if they had been coal merchants, for example?] They would then, probably, have been unable to make the advance. In order to make it, they were obliged to avail themselves of the connexion, which, as bankers, they had with their London correspondents, and which, as coal merchants, they would not have had. So, as to the argument with respect to the alleged improvidence of the advance,—that would not render it less a banking transaction, if it were established; for it has never been held, that the character of a transaction, as a trade dealing, is to depend on the degree of prudence with which it is conducted. But there is no foundation in fact for the argument; for when the advances were made, the *Horseley Company* was in good credit.

Mr. *Russell*, in reply.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The question upon this petition is, whether the circumstances of the case bring it within the principles, upon which *Ex parte Sillitoe* was decided; for to those principles this Court must, I think, adhere, enforced as they were on that occasion by a judge (of Lord *Eldon's* station and personal authority) recognizing their obligation upon him. He there decided, that advances of money by a firm of two persons to a distinct firm of six persons,

including the two former, made by way of loan out of the joint assets (for so I must take the facts to have stood) of the firm of the two, did not constitute a debt necessarily proveable under the bankruptcy of the six for the estate of the two, and did not constitute a debt so proveable in the circumstances of that particular case. He held it not to be brought within either of the exceptions, to which the general rule, excluding such a proof, is liable.

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More than eighteen years before, in *Ex parte St. Barbe* (a), the same eminent judge is found expressing himself thus (b): "There have been cases of a trade carried on by three, and distinct trades by two, and by one of them; when this sort of proof of a debt distinctly due from one partnership to the other has been permitted, as between the partners so engaged in different concerns, the course of the authorities has been, that a joint trade may prove against a separate trade, but not a partner against a partner;" and it is stated in the report, that in that case the petition stood over until the Lord Chancellor was satisfied that the trades were distinct; when the Order was made, declaring that, as it appeared that one of the partners carried on a distinct trade from that of the partnership, the partnership was entitled to prove against the partner for such debt as he in such distinct trade owed to the partnership. That is the report in *Vesey*, which I dare say is correct; but the Order made in that case, I am told, upon inquiry, cannot be found in the office.

In *Ex parte Sillitoe* (c) Lord Eldon says, "Another relaxation of the rule was therefore admitted, that, where there is a demand arising from a dealing by the partner-

(a) 11 Ves. 413.

(b) *Id.* p. 414.

(c) 1 G. & J. 383.

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ship in a distinct trade, proof might be admitted; but then the question, what is a dealing in a distinct trade, is always to be looked at with great care. I apprehend, that the principle does not apply more to two persons who happen to be constituent members of a partnership of six, than to one or each of the six, if one or each was a distinct trader. I take it to be quite clear, that, if an individual partner has nothing more to say than this, that he has lent 100*l.* to his partnership, the strict rule immediately applies to him, and shuts him out from the proof: if it were sufficient to state, that the partner would not have lent the 100*l.*, but as a separate trader, the rule is at an end. We are not therefore merely to consider the question, whether *J. and W. Jackson* were partners as ironmongers, but whether this is to be considered a transaction between trade and trade; and, in looking at the circumstances with a view to that question, great care is necessary, lest we establish a principle, which might in its consequences be the destruction of the rule; and if it be supposed, that Mr. *Goodchild*, or any individual of the six, had been a separate trader, as a coal-dealer, or corn-dealer, and had, with his separate monies, retired a bill discounted at the Bank of England; is it to be said, because he is a separate trader, that therefore the retiring of that bill is to make him a creditor to prove against the creditors of the partnership?" And on a subsequent day, Lord *Eldon* said, that he had carefully examined all the cases relating to this question of proof by partners as separate traders in competition with their joint creditors, and that they were all cases, in which the articles of one trade had been furnished to another trade; that there was no case in which the exception had been allowed, where money had been advanced to the

partnership by one or more of the partners, and that his opinion was, that the proof could not be maintained. The Order in this case, which is in the office, is simply one reversing that of Sir *John Leach*, and dismissing the original petition.

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The question therefore, as I apprehend, now before me is this : was the demand sought to be proved, or any part of it, constituted by a dealing between trade and trade? Is it the trade, or merely the estate of *Oliver* and *York*, that is seeking to prove against the trade or estate of *Oliver*, *York* and *Harrison*? Not, were *Oliver* and *York* creditors, but were they creditors in their distinct trade or concern of bankers? Was the dealing, or any part of it, a dealing by or with *Oliver* and *York* in their distinct trade of bankers? A question, which Lord *Eldon* tells us, "is always to be looked at with great care."

Now, to arrive at a determination on this point, it is obviously material to ascertain the composition and circumstances of the demand. Before considering which, however, it is right to inquire, whether, in the correct or ordinary sense of the term, the relation of banker and customer subsisted between the banking house of Messrs. *Oliver* and *York*, and the Horseley Company.

Upon the evidence, I must take the truth to be, that, from a time preceding the year 1836, and therefore preceding considerably the earliest of the advances in question, Messrs *Oliver* and *York* were not, and the Dudley Banking Company were, the bankers of the Horseley Company. I am not now saying, whether either of the transactions in question ought, or ought not, to be considered as a banking transaction. I say merely, that, however that matter ought to be viewed, Messrs. *Oliver*

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and *York* were not, either according to the strictly correct, or a popular and ordinary, use of the term, bankers of the Horseley Company at any time after the year 1836, according to my view of the facts. The earliest of the advances in question was not before December 1839.

The demand divides itself into two heads: first, the advances at interest or upon discount, by Messrs. *Oliver* and *York* to the Horseley Company, with the attendant charges for interest and commission; secondly, various other items,—some of them very inconsiderable,—the nature and character of which are not clearly or sufficiently explained. None of them are, in my judgment, proved to be of a banking nature, or to belong, or be incidental, to the relation of banker and customer,—my opinion of the absence of which relation, after the year 1838, (of dates subsequent to which all these items are), I have already stated. These items seem to me to be matter of account between the Horseley Company and Mr. *Oliver* and Mr. *York*, as members of that company, merely. The information respecting them, with which I have been furnished, is, I repeat, scanty and obscure. It has not been suggested on the part of the respondents, that further investigation upon this head is likely to benefit their case; and, it being for them to bring themselves by evidence within an exception from a general rule, I am not able to see my way to allowing a proof as to this second class, the amount of which is inconsiderable in comparison with the other. Before proceeding to which I may observe, that the old balance against *Oliver* and *York*, with which the account commences, must probably be considered as having been extinguished, in or before the year 1840, by some of the items of credit in their favour.

Now, as to the advances at interest, or upon discount, under what circumstances were they made? They were made to the Horseley Company, for the purpose of assisting and relieving that concern when in a state of difficulty and pressure,—made without security given, without security asked,—and this in the total absence (unless so far, if at all, as the very transactions in question were banking transactions) of the relation of banker and customer between the two firms,—this also, under circumstances rendering it in my judgment impossible to view the advances, considered without reference to the interests of the Horseley Company,—considered, I mean, upon the supposition that *Oliver* and *York* were not partners in the concern, and had not executed the bond—as according to any ordinarily prudent course of managing or conducting a banker's business, or to any course, which men, guided by a view to their own pecuniary interest, would have taken. It is in my opinion a correct conclusion from the evidence to believe, that, if Messrs. *Oliver* and *York* had not been partners in the Horseley Company, and had not executed the bond, neither of the advances would have been made. The advances were, as it appears to me, such in object and in character, and so circumstanced, that, if *Oliver* and *York* had had a dormant partner in their banking house, who had left to them the management of its business upon the understanding that they would conduct it fairly, and with a reasonable degree of attention, (that partner having no share in the Horseley Company,) he would have been entitled, as between himself and Messrs. *Oliver* and *York*, to throw these advances wholly on them, and probably to claim a dissolution of the partnership. Nor is it clear to me, that, *if the three had become*

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bankrupt, the amount of damage occasioned to the estate of the three by the advances would not have been proveable against the estates of *Oliver* and *York*, upon the principle recognized in *Slaney's case* (a). It may be said, however, that neither the unusual nature and the improvidence of the advances, considered as banking transactions, nor the motive for them, can deprive them of their character of banking transactions, if otherwise it be shown to belong to them; and this may be so. But is it otherwise shown to belong to them? Not, as it appears to me. The charge or claim of commission is not by any means conclusive. The books of the two firms in evidence, considered as they ought to be with a due regard to the fact that Messrs. *Oliver* and *York* were members of the Horseley Company, seem to me, without more, if not to prove,—at least not to be inconsistent with the notion,—that the advances were not banking transactions. But when to the books are added the bond, the various letters in evidence (some of them more material than others), the facts undisputed, and the facts to my satisfaction established,—the result is conviction in my mind, that all the advances (of which not one was in my judgment made for any other reason than that *Oliver* and *York* were partners in the Horseley Company, and had joined in the bond) were made by them in the character merely and exclusively of partners in the Horseley Company, or of partners in the Horseley Company and obligors in the bond,—were made consequently not in Messrs. *Oliver* and *York's* distinct business as bankers,—were consequently not advances between trade and trade,—were, though made by *Oliver* and *York* being bankers, not made by *Oliver* and *York*, as bankers. These, it is true, were money dealings—and bankers may be said to

(a) *Ex parte Yonge*, 3 V. & B. 31.

deal in money. But not every dealing with articles, in which an individual or a firm trades, is a dealing of the trade, or in the trade. A mercer, or a bookseller, disposing of silks or books by gift, by betting, or by gaming, does not dispose of them in his trade. Nor can it be said, that everything that a banker does with money or bills is done by him, as a banker. A man's trade or business may afford him peculiar facilities for a particular course of acting, and he may use them for that purpose accordingly; but, as was observed by Mr. *Russell*, the use of these facilities is not necessarily a use of them in the trade or business, by means of which they are possessed or obtained.

The transaction of *Barnes's* bill seemed to me, at first, capable probably of being distinguished favourably for the respondents from the rest. I have found myself unable to retain that impression,—unable to find any tenable ground for substantial distinction under all the circumstances of the case.

The anxiety, with which a case of any difficulty must always be viewed by a judge, has not been lessened in the present instance by the consideration, that the abstract justice of this particular case, if viewed without reference to precedents, general rules and general convenience, might be thought at least as much with the respondents as with the petitioners; by the consideration also, that, upon mere matters of fact, my judgment in this jurisdiction is, I am apprehensive, without appeal, and the reflection that I am differing from a Commissioner of experience, whose capacity and acquirements, which a friendship I am happy to say of many years has enabled me to appreciate, are estimated by me highly. Having however been unable to bring my mind ultimately to any other view of

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the case than that which I have stated, I am obliged to direct the proof to be disallowed, each estate bearing its own costs.

ORDERED accordingly.

Lincoln's Inn,
December 6.

In the matter of MARSHALL.—

The Court will only sanction a compromise made by the assignees with a claimant against the bankrupt's estate, subject to the approbation of the Commissioner.

MR. *Heldane*, on the part of the assignees in this bankruptcy, applied for the sanction of the Court to a compromise which they had made with a party who had a claim against the bankrupt's estate, by paying him the sum of 850*l.* in discharge of 2000*l.*, the full amount of his demand. There was an affidavit that the majority of the creditors consented to the arrangement, and that it would be for the benefit of the bankrupt's estate.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I have no means of knowing that this compromise will be for the benefit of the estate, except from this general statement in the affidavit of the assignee. Let the assignees be at liberty to make the proposed compromise, subject to the approbation of the Commissioner.

Ex parte JOHN WHIPPLE.—In the matter of
JOHN WHIPPLE.—

1843.

*Westminster,
Nov. 8, and
Lincoln's Inn,
Dec. 6 and 8.*

THIS was a petition of the bankrupt to annul the fiat, on the ground that, before the adjudication took place, the petitioner had filed a petition and schedule to the Court of Bankruptcy, under the 5 & 6 *Vict.* c. 116, and had obtained from one of the Commissioners an interim Order for protection. It appeared that a docket in the bankruptcy was struck by the petitioning creditor on the 22nd of September, and that the fiat issued on the 25th, and that there was an execution in the bankrupt's house at the suit of one of his creditors when the fiat issued, but which execution was withdrawn by the sheriff on receiving notice of the issuing of the fiat. On the 29th of September the petition under the Insolvent Debtors' Act was filed, in pursuance of a notice of the petitioner's intention to do so, which was advertized in the London Gazette of the 22nd and 26th of September, and twice in a London newspaper, and a notice was also duly served on the petitioning creditor on the 25th September, as well as the bankrupt's other creditors. The adjudication under the fiat did not take place until the 11th of October. The petitioner alleged that the debts owing by him amounted to less than 300*l.*

A docket was struck on the 22nd Sept., upon which a fiat was issued on the 25th Sept., but was not opened until the 11th Oct. In the meantime, between the 22nd and 29th Sept., the bankrupt received several debts due to him, and on the latter day filed his petition under the Insolvent Act, 5 & 6 *Vict.* c. 116., and obtained an interim order of protection, on the allegation that his debts did not amount to 300*l.* On a petition by the bankrupt to annul the fiat, on the ground of the delay in opening it, and also for the purpose of giving effect to the proceeding in insolvency, the Court declined to do so, either under the provisions of the 5 & 6 *Vict.* c. 122. s. 4., or the general provisions of the 5 & 6 *Vict.* c. 116.

It was alleged in the affidavits sworn in opposition to the petition, that the schedule to the petition of the bankrupt under the Insolvent Act stated that there was only the sum of 14*l.* 18*s.* 7*d.* due to the bankrupt for good book debts; whereas on the 22nd September, the bankrupt produced a list of debts which he said were then due, amounting to nearly 100*l.*, and that since that day the bankrupt had received several of those debts;

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And that the only reason why the petitioning creditor delayed the opening of the fiat until the 11th of October was, because he was informed by his solicitor that the Commissioners in Basinghall Street had made a rule, that any witness to prove the trading must state upon his oath, that he had known the bankrupt for four months previously, and that, as the only witness, whom the petitioning creditor could produce for that purpose, had only known the bankrupt from the 10th of June last, the petitioning creditor was advised by his solicitor to wait until the 11th of October, when the witness could safely swear that he had known the bankrupt for four months preceding.

Mr. *Swanston*, in support of the petition. The petitioning creditor has in this case been guilty of so much delay in opening the fiat, that the Court is bound to annul it, under the provisions of the 5 & 6 *Vict. c. 122*, s. 4 (a). The fiat was issued on the 25th September, and was not opened until the 11th October, and no extended time had been allowed by the Commissioner; so that, as more than three days had elapsed after the fiat was transmitted to the Commissioner, it could only be opened, within fourteen days then next following, by some other creditor to the amount required by the act to constitute a petitioning creditor. [The *Chief Judge*. The act does not say, that the petitioning creditor shall not open it after the expiration of the three days, but only that any other creditor may.] The act seems to imply a restriction to the petitioning creditor opening it after the three days. The object of this petition is, that the fiat may be removed out of the way, in order to give

(a) See Appendix, page ii.

effect to the adjudication of the Commissioner under the Insolvent Act (a), which will be a much less expensive form of proceeding, as the bankrupt has sworn that his debts are less than 800*l*.

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Mr. *Bacon*, *contra*. The fourth section of the new statute was not intended to have the effect contended for. By the general order of Lord *Loughborough* (b), a commission of bankrupt to be executed in London was declared supersedable, for want of prosecution, at the expiration of fourteen days after its date; and the intention of the provision in the new statute was merely to enable the Commissioner to let any other creditor open the fiat, without making it necessary to apply for a supersedeas. The fourth section only takes from the petitioning creditor the exclusive privilege of opening the fiat, after the expiration of the three days. The interval, that was suffered to elapse between the issuing and the opening of the fiat, is satisfactorily accounted for. It appears to be the practice of the Commissioners in Basinghall Street to require the witness, who is called to prove the trading, to swear that he has known the bankrupt for the space of four months; and the witness, in this case, could not depose to that fact before the 11th of October. The Court will not say, that this rule of the Commissioners is an unreasonable rule. [The *Chief Judge*. Supposing a man has for the space of a month carried on trade in a showy shop in Cheapside, and then comes a smash,—is he not to be held a trader within the bankrupt law, because no one can swear that he has traded for four months?] The rule of the Commissioners,

(a) 5 & 6 *Vict.* c. 116. See Appendix, page xcvi.

(b) 26th June, 1795. See 2 *Deac. B. L.* 85.

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it is presumed, is not inflexible, and will be relaxed according to circumstances. But the fourth section is merely directory, and cannot be extended beyond the cases for which it provides. It merely regulates the practice as to opening the fiat, and enables any other creditor to have the carriage of it within fourteen days; and, even supposing that the petitioning creditor is excluded during that interval, he is after the expiration of the fourteen days remitted to his original right. The fiat therefore has been duly prosecuted, and cannot now be impeached by the petitioner.

As to the proceeding under the act for the relief of insolvent debtors, it is submitted that the petitioner cannot proceed under that act. If the fiat is valid in law, there is no estate on which the Insolvent Debtors' Act can operate. The bankrupt has surrendered to the fiat; and all that the bankrupt has yet obtained under the Insolvent Act is what is called an interim Order for protection, the petition for which was filed four days after the issuing of the fiat. It may be very consistent with the facts of this case, that on the 22nd of September, when the docket was struck, the bankrupt may not have been within the provisions of the Insolvent Act, by reason of his debts amounting to more than 300*l.*, and that on the 29th of September, when he filed his petition under that act, he might have reduced his debts, by payments in the mean time, to something less than 300*l.* But the question is, whether at the date of the fiat he owed less than 300*l.* For it has been sworn, and not denied, that the bankrupt received several debts due to him between the 22nd and the 29th of September. The affidavit of the bankrupt states that the expenses of prosecuting the fiat will be 80*l.*, and that there will not

be a penny in the pound to divide among the creditors. The creditors however entertain a very different opinion on this subject, and hope to recover the amount of the debts which the bankrupt has thus improperly received. The only plausible reason for superseding the fiat is the interval which occurred between the issuing and the opening of the fiat; but this has been already accounted for. The Court therefore will not under these circumstances annul the fiat, on the mere petition of the bankrupt.

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Mr. *Swanston*, in reply. The legislature has provided a more economical system for administering assets under the Insolvent Act, than under the bankrupt law, where the trader's debts do not amount to 300*l*. Now, here is an express case within the provisions of the statute. The proceeding under the insolvency is a valid proceeding, and expressly provided by the act of parliament. The fiat did not assign any property of the petitioner, when the proceeding under the Insolvent Act took place; for no property could pass under the fiat before adjudication: and as this did not take place until twelve days after the proceeding under the insolvency, the appointment of assignees under the fiat, who were not chosen until the 5th of December instant, was perfectly nugatory; for there was then nothing to assign. With respect to the recovery of the payments alleged to have been made to the bankrupt after the 22nd of September, if they were not made *bonâ fide*, they may be impeached as well in insolvency as in bankruptcy. Then, as to the construction of the fourth section of the 5 & 6 *Vict. c. 22.*,—the petitioning creditor has three days allowed him to open the fiat, and if he does not open it within that

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period, then any other creditor is allowed fourteen days for that purpose. This last period of fourteen days cannot surely apply to the petitioning creditor. If, however, the Court should think that the petitioning creditor is not excluded by the fourth section, then it is submitted, that the Court has a discretionary power over its own process, and that this fiat ought to be superseded. Here the petitioning creditor has taken part in the proceedings under the insolvency; for he attended before the Commissioner to oppose the examination of the insolvent, and the examination was accordingly adjourned.

Mr. Bacon. The last circumstance mentioned is quite consistent with the denial by the petitioning creditor of the bankrupt's right to any benefit under the Insolvent Act.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—This is a petition presented by the bankrupt to annul the fiat, on two grounds: 1st, that an improper length of time had taken place between the issuing of the fiat and the opening; and 2nd, that the bankrupt had obtained an Order of protection under the Insolvent Debtors' Act. With respect to the first objection,—considering the language of the 4th section of the 5 & 6 Vict. c. 122, it might have been as well perhaps if the Commissioner had held his hand, until an application had been made to the Lord Chancellor, or the Court of Review. The Commissioner did not proceed to adjudicate under the fiat, until the 11th of October. The question is, therefore, does this lapse of time render the adjudication void, so as to compel this Court to annul the fiat? I think that such delay does not absolutely vitiate the fiat. It might,

indeed, form a ground for an application to the discretionary jurisdiction of the Court; but I do not think that the present is a case in which it is right to exercise that discretionary jurisdiction. I am not saying, however, that this delay, or even a less delay, might not be a sufficient ground, under certain circumstances, to annul the fiat at the costs of the petitioning creditor.

The next question is, as to the conflict between the two acts of parliament relating to bankruptcy and insolvency, and which proceeding ought in this case to be preferred. It appears that on the 22d of September the petitioner signed a declaration of insolvency, with the participation of the attorney for the petitioning creditor. That, no doubt, was for the purpose of committing an act of bankruptcy; and yet it is extraordinary, that the same individual inserts in the Gazette of the same day a notice to take the benefit of the Insolvent Debtors' Act. It is difficult to comprehend why this should have been done. The petitioning creditor issues a fiat on the 25th of September. This collateral proceeding goes on, and on the 29th of September the petition under the Insolvent Act is filed. Still, however, the fiat is in existence; it is true that the adjudication has been delayed, whether for a good or a bad reason; but it does not appear that there was any intention to abandon the proceeding under it. The question then is, whether by reason of these proceedings I am bound to annul the fiat. The course in bankruptcy is trite and plain, while the proceeding under the Insolvent Debtors' Act is new, and therefore not so well known; it may be consequently open to argument, and not so safe a course to pursue, as the beaten course under the Bankrupt Act. It is said, that there will be a great saving of expense, by adopting

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the former mode of proceeding ; but a great portion of that expense has been already incurred. It is very proper, that the bankrupt should endeavour to save expense ; but no creditor joins him in this application. That is, therefore, not a very forcible reason for inducing the Court to supersede the fiat. I find, however, this undisputed fact,—that between the 22d and the 29th of September, debts to an amount which may be called considerable were received by the bankrupt himself from some of his debtors ; and the petitioner confesses having done this, after having on the 22d of September signed a declaration that he was unable to meet his engagements, and intended to take the benefit of the Insolvent Act. I am not satisfied, that this was a proper course for the bankrupt to have pursued. Now it is possible, though far from certain, that circumstances may exist, which may enable the assignees to recover this money more easily under the Bankrupt Act, than under the Insolvent Act. I am therefore of opinion, that this petition ought to be dismissed ; but, considering the time which elapsed between the issuing of the fiat and the adjudication, it must be upon condition that the assignee, who is also the petitioning creditor, shall undertake to pay to the bankrupt's solicitor 5*l.* out of the estate, and shall also undertake to concur in any proceedings which may be necessary to annul the proceedings under the Insolvent Act.

Petition dismissed.



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Ex parte FORD.—In the matter of TAYLOR.—

THIS was the petition of the public officer of the Stourbridge Banking Company, for the usual Order, as in the case of an equitable mortgage. It appeared that the bankrupt had been in partnership with his father, and that deeds relating to the property of the father were deposited, with a memorandum in writing, to secure the joint debt of the father and the son. The father had since died, when only a portion of the original debt remained due. After his death the bankrupt verbally agreed, that the deeds should remain in the petitioner's hands, to secure any balance that might be due on a running account with the bankrupt. And the balance now claimed was partly a joint debt of the father and son, and partly a separate debt of the bankrupt.

*Lincoln's Inn,
Dec. 18.*

Where deeds were deposited, with a written memorandum, to secure the debt of two partners, and after the death of one, it was verbally agreed that the deposit should be extended to secure the separate debt of the surviving partner: *Held*, that the costs should be apportioned as to the sums respectively due from the joint and separate estates, in the one case as on a deposit with a written agreement, and in the other as on a deposit by parol.

Mr. *Bacon*, for the petitioner.

Mr. *Shebbeare*, *contra*.

VICE-CHANCELLOR KNIGHT BRUCE, C. J., at first doubted, whether a lien on deeds deposited to secure the joint debt of the two could be thus extended to secure the separate debt of the bankrupt by a mere parol agreement; but, being afterwards satisfied that it could be so extended^(a), he made the Order, declaring the petitioner to be an equitable mortgagee, but that the costs should be apportioned under two different heads, one as

(a) See *Ex parte Kensington*, 2 Vea. & B. 79; 2 Rose, 138; *Ex parte March*, 3 Rose, 239; *Ex parte Brown*, *ibid.* 242, note; *Ex parte Alexander*, 1 G. & J. 409; *Ex parte Lloyd*, *ibid.* 389.

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to the balance due on the partnership account, and the other as to the balance due on the separate account of the bankrupt; and that in the first case the costs should be allowed, as in the case of a deposit with a memorandum in writing, and in the other, as in the case of a verbal deposit.

Ex parte FRANCIS GILLETT.—In the matter of GEORGE TAYLOR.—

Lincoln's Inn,
Dec. 20.

Where, in June 1837, the bankrupt verbally deposited a bundle of deeds with the petitioner to secure a debt, which the petitioner believed were all the deeds relating to the property in question; and in August 1843, only two days before the issuing of the fiat, the bankrupt deposited two other material deeds relating to the property; and there was no affidavit on the part of the assignees, or the bankrupt, impeaching the validity of the latter deposit; the Court would not impute to it the character of a fraudulent preference, and made the common Order, as in the case of a verbal deposit.

THIS was the petition of an equitable mortgagee for the usual Order, as in the case of a deposit, accompanied with a memorandum in writing.

The petitioner had, before June 1837, lent to the bankrupt various sums, for securing the repayment of which, the bankrupt had deposited with the petitioner the title deeds of a dwelling house and premises at Moreton in the Marsh, in the county of Gloucester. On the 24th June 1837, the parties came to an account, when a balance was struck of 150*l.*, as being due to the petitioner; and it was agreed that the bankrupt should secure the repayment of this sum to the petitioner by the joint promissory note of himself and his father, and by the deposit of the title deeds relating to the moiety of certain other premises to which the bankrupt was entitled, subject to the life interest of one *H. Careless*, and that the petitioner should give up to the bankrupt the title deeds which had been previously deposited.

This arrangement was carried into effect; and the bank-

The last deposit was accompanied with the following memorandum: "The deeds are placed in the hands of *F. G.*" *Held*, that this did not entitle the petitioner to an Order as on a deposit, accompanied with a memorandum in writing.

rupt thereupon deposited with the petitioner a bundle of deeds, which he represented, and which the petitioner believed, to be all the deeds and documents relating to the last mentioned property. On the 17th December 1841, *H. Careless*, who had a life interest in this property, died, whereby the bankrupt became entitled in possession to an undivided moiety in it. On the 27th August 1843, the bankrupt delivered to the petitioner's solicitor two other deeds relating to the last mentioned property, one being a satisfied mortgage, and the other being an indenture, dated the 21st March 1831, whereby one *John Careless* had conveyed to the bankrupt one equal undivided fourth part of such property, the bankrupt having been previously entitled to one other undivided fourth part. On the satisfied mortgage deed the following memorandum was written, in the handwriting of the bankrupt: "The deeds are placed in the hands of *Francis Gillett*, of Dorn." When the two last mentioned deeds were thus delivered to the petitioner's solicitor, the bankrupt stated that they belonged to the petitioner, and ought to have accompanied the title deeds deposited with the petitioner on the 24th June 1837. The petitioner stated, that he had no reason to believe, until the 27th August 1843, that the bankrupt had not in fact deposited with him all the deeds relating to his interest in the last mentioned property. In March 1843, the bankrupt's father, who had joined him in the promissory note, died, the bankrupt having previously paid 50*l.* in part discharge of it. On the 29th August 1843, the fiat issued, when there was still due to the petitioner a balance of 100*l.*, and interest.

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Mr. *Bacon* appeared in support of the petition.

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Mr. *Shebbeare*, for the assignees, submitted, that as two of the most material deeds relating to the property in question were only delivered to the petitioner's solicitor two days before the issuing of the fiat, and this apparently without any pressure on the part of the petitioner or his solicitor, the case was attended with great suspicion of the transaction amounting to a fraudulent preference; and that the Court, under these circumstances, would not make the usual Order, as in case of an equitable mortgage, which was a mere matter of indulgence, and not one of strict right. In *Ex parte Ainsworth*, in the matter of *Goren* (a), it was held, that a deposit of title deeds, without pressure, on the eve of bankruptcy, to secure an antecedent debt, is a preference.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—As there is no affidavit made by the bankrupt, or any other person, that throws out the slightest imputation as to the *bona fides* of this transaction, I could not, if I were upon a jury, decide, that, under the circumstances stated in the petition, it amounted to a fraudulent preference; but, as the first deposit of the deeds, in June 1837, was without any memorandum in writing, I do not think that the very vague and short memorandum on the back

(a) 3 Mont. & A. 451. There is a fuller report of this case in 2 Dec. 563, which was in the matter of *Walker*, and not in the matter of *Goren*, and in which the reporter was one of the counsel. The marginal note there is, that "Where it appears, on the face of the petition of an equitable mortgagee, that the deposit of the deeds took place only nine days before the issuing of the fiat, and there is nothing to rebut the presumption of fraudulent preference, the Court will not make the usual Order, but will direct the property to be sold, and the proceeds paid into Court, subject to further Order." But see *Ex parte Heathcoat*, 2 M.D. & D. 711, in which *Ex parte Ainsworth* was cited.

of the mortgage deed, which was only delivered to the solicitor on the 27th March 1843, will supply that defect. The petitioner, therefore, will only take the usual Order, as upon a verbal deposit.

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Ex parte
GILBERT.

Ex parte ISAAC ASHMORE.—In the matter of THOMAS
FRANCIS LUCAS.—

Lincoln's Inn,
Dec. 21.

THIS was the petition of a creditor, who had proved under the fiat, for the removal of an assignee.

Where the sole assignee was the managing clerk of a solicitor, who had bought an estate of the bankrupt, and had neglected to complete the purchase, the Court ordered him to be removed, and that there should be a new choice.

The fiat issued on the 11th January 1834, under which *G. F. Cole* was appointed sole assignee, who in January 1839 became, and had since continued to be, the managing clerk to Mr. *Tibbits*, a solicitor in Northamptonshire. On the 6th August 1840, the assignee sold by auction a reversionary interest to which the bankrupt was entitled in an estate in Northamptonshire, producing a rent of 400*l.* per annum; but the particulars of sale stated it to be doubtful, whether the bankrupt's reversionary interest in the property was only a life interest in reversion, subject to a charge of 4000*l.*, or amounted to a reversion in fee, without incumbrance; and that the assignee would only sell such interest as he had therein. Previous to the sale taking place, a notice was served upon the assignee by the solicitors of the wife and children of the bankrupt, stating, that a suit in Chancery had been instituted by them against the assignee, as well as the trustees under the bankrupt's marriage settlement, for the purpose of having it declared, that the estate advertised for sale was subject to the uses and trusts of such settlement, and for the purpose of obtaining a conveyance

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ASHMORE.

and confirmation of the estate to such uses and trusts; and that the decree, which might be made in such suit, would be binding on the purchaser. This notice was read to the company assembled at the auction. Mr. *Tibbits* was declared the purchaser at such sale for the sum of 1370*l*. The petition alleged, that Mr. *Tibbits* accompanied the assignee to the sale, and that there was no chance, under these circumstances, that the fair value of the assignee's interest in the property could be obtained for it, and that 1370*l*. was a grossly inadequate price; that *Tibbits* had since neglected to complete the purchase, and that the assignee had taken no steps either to rescind the contract, or to compel *Tibbits* to perform it; that the assignee employed *Tibbits* to act as his solicitor in the Chancery suit; and that he himself was entirely under the influence of *Tibbits*, and that his interest and duty as the clerk of *Tibbits* were in opposition to his duty as assignee. It appeared, that twelve creditors had proved debts under the fiat, to the amount of 1066*l*.; and that all, except the assignee, had approved of the present application. It was also alleged, that there was no other estate of the bankrupt, except what was comprised in the alleged purchase; and it was submitted, that it was necessary for the interests of the creditors, that an assignee should be appointed, who would be able and inclined to take proper proceedings against *Tibbits*, to compel him to complete the purchase.

Mr. *J. Russell*, and Mr. *Terrell*, were in support of the petition.

Mr. *Swanston*, and Mr. *Collins*, *contra*. There is no

sufficient ground stated for the removal of the assignee. The only plausible reason suggested, is, to enable the petitioner to take proceedings against *Tibbits* to enforce the performance of the contract. But he may be allowed to do this, without the removal of the assignee, on giving him a proper indemnity against the costs of such proceedings.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—There are various cases, in which the Court has allowed proceedings to be taken against a party in the name of an assignee ; but, under the peculiar circumstances of this case, I think it the most convenient course to discharge the present assignee from the duties of his office, without, however, casting any reflection on Mr. *Cole*. The Court, on the present occasion, merely expresses its opinion, on the undisputed facts of the case, that it is most advisable that Mr. *Cole* should retire from the duties of the office of assignee. The Order will be, therefore, that there shall be a new choice of assignees, reserving all the costs of this petition and of such choice, with liberty to Mr. *Cole* to make any application to the Court as he may be advised. I at present give no opinion as to the merits of Mr. *Tibbits*, or of Mr. *Cole*, or of this petition.



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*Lincoln's Inn,
Dec. 6 and 11.*

1. A mortgagee is entitled to tack one mortgage to another on his petition for a sale, if the assignees decline an offer made by him to abandon all right of proof on their releasing the equity of redemption in both mortgages.

2. *Seemle*, that he would be so entitled whether such offer were made or not, and that the right of tacking is the same whether the party seeking relief is the mortgagor or the mortgagee.

3. A mortgagee assigns the mortgage debt and executes a bond to the assignee for the amount, but by a memorandum of even date with the assignment, he declares that he advanced to the assignor part of the debt only, and will stand possessed of the remainder, (specifying the amount), in trust for the assignor. The security proving deficient, *held*, that the transaction was in substance a submortgage, giving the assignee a priority as to the amount advanced by him.

Ex parte BERRIDGE and others.—In the matter of
LOOSEMORE.

THE petitioners claimed to be equitable mortgagees of one freehold estate of the bankrupt, and legal mortgagees of another, and they claimed a right to tack the two together under the following circumstances.

By indentures of lease and release of the 28th and 29th of September 1829, certain freehold hereditaments were conveyed by one *James Salter* to the bankrupt in fee upon trust for sale in case of default being made in the repayment of a sum of 700*l.* and interest by a day named.

By another indenture of the 29th of September 1838, the bankrupt assigned to one *Morrish*, (under whom the petitioners claimed), his executors, administrators and assigns, the mortgage debt secured by the former deeds, together with the interest to grow due thereon, and the covenant whereby the same was secured, and all other securities for the same. The deed contained the usual power of attorney to recover the mortgage debt, and a covenant that the debt was still due, but there was no conveyance of the mortgaged premises.

Contemporaneously with this deed, the bankrupt executed a bond to *Morrish* for 1400*l.*, conditioned to be void on payment of the 700*l.*, but, by a memorandum of the same date, *Morrish* declared that 500*l.* only had been advanced by him to the bankrupt; and that 200*l.* residue of the 700*l.* was the proper money of the bankrupt, and *Morrish* thereby undertook to stand possessed of the said sum of 200*l.* in trust for the bankrupt.

Upon the execution of these documents the title deeds

of the mortgaged estate were handed over to *Morrish*, who afterwards died. The petitioners derived their claim under his will.

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Ex parte
BERRIDGE
and others.

The petitioners claimed to be legal mortgagees of the other freehold estate, mentioned in the petition, by virtue of a deed of appointment of the 25th of June 1838, whereby the bankrupt appointed the last mentioned freehold hereditaments to *Morrish* in fee upon trust for sale in the event of the bankrupt failing to repay to *Morrish* a sum of 400*l.* with interest by a day named in the deed.

The fiat issued on the 25th July 1842, and this petition was for a sale of the premises comprised in both mortgages, and for the application of the proceeds as one fund in payment of both debts.

Mr. *Bacon* in support of the petition. The first objection made by the assignees to the claim of the petitioners is, that the transaction of the 29th of September 1838, did not amount to an equitable mortgage for 500*l.* but was a declaration of trust as to five-sevenths of the whole 700*l.* for *Morrish*; and as to the other two-sevenths for the bankrupt himself, and upon this ground, the assignees claim to be entitled to two-sevenths of the proceeds of the property in the event of their falling short of the 700*l.* secured by the original mortgage deed. But that is not the proper construction of the memorandum, and if there could be any doubt on the subject, it would be removed by the fact of the bankrupt having executed the bond of even date with the transfer of the mortgage debt. The next objection of the assignees is that the petitioners cannot tack the two mortgages together, and apply the proceeds as an aggregate fund in satisfaction of both debts, and upon this part of the case the assignees rely on *Ex parte*

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Ex parte
BARNARD
and others.

Bignold (a), and contend that the right to tack only exists where the mortgagor comes to redeem. But the decision there was contrary to an express decision of Lord *Hardwicke* in *Trebourg v. Lord Pomfret* (b), as appears from the statement of the latter case from the registrar's book in Mr. *Blunt's* edition of *Ambler's Reports*. And although it is true that *Trebourg v. Lord Pomfret* appears to have been cited in *Ex parte Bignold*, yet it is not noticed in the judgment. *Ex parte Alsager* (c) is an authority in favour of the petitioners. [The *Chief Judge*. That was an application to redeem, and is not inconsistent with the distinction.] Even supposing there to be any authority for applying one law to an application to redeem, and another to an application to foreclose, still this is not an application to foreclose, but to obtain the benefit of the statutable execution afforded by the bankrupt laws for all the creditors after payment of the mortgage debts. [The *Chief Judge*. The substance of the objection is that the mortgagee can only tack when he is passive, and not when he is active.] If the assignees will give up the equity of redemption we are ready to take the securities in satisfaction of the mortgaged debts.

Mr. *Shapter*, for the assignees, declined giving up the equity of redemption. The Court cannot accede to the prayer of the petition without overruling *Ex parte Bignold* (d), the authority of which has never yet been

(a) 3 Mont. & Ayr. 9; 2 Dea. 88.

(b) Cited in argument in *Ex parte Carter*, Ambler, 733.

(c) 2 M. D. & D. 328.

(d) 3 Mont. & Ayr. 9; 2 Dea. 88. The order in that case was sent for, and read by his Honour. After referring it to the Commissioners to take the usual account of the several principal sums and interest, it directed that the

impugned. It was decided by the full Court, and is quite in accordance both with principle and with the law, as laid down in text books, and as it is to be collected from decided cases. The principle on which the doctrine of tacking proceeds is stated to be, that he who seeks equity shall do equity to the person from whom he requires it (a). And a writer, whose work on mortgages is one of those most commonly in use, after stating to the same effect the principle of the decisions, adds, "But there is no pretence for the interposition of this maxim where a mortgagee comes to foreclose, for his intention is to shut out the mortgagor from his equity, and strictly to enforce his own legal title (b)." These propositions are fully borne out by all the cases except

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Ex parte
BRANDON
and others.

estate comprised in the mortgage securities and charge and the policy should be sold, and that the several and respective proceeds should be applied in the first place in payment of the expenses attending such sales and of the proceedings incidental thereto, and the costs of the petition, and then (with the exception of the proceeds of the policy) in payment to the petitioner of what should be so severally found to be due and owing to him upon and in respect of his several securities, and that the surplus of the said respective proceeds, (if any), arising from each respective security, be paid over to the assignees, but if the several monies arising from the said sales (first subject as aforesaid) should not be sufficient to pay to the petitioner the respective amounts of what should be so severally found due to him upon each of his said securities, the petitioner was to be at liberty to go in under the fiat, and prove for the several and respective deficiencies of his several and respective securities.

(a) *Coots on Mortgages*, 471, 2d edit.

(b) *Powell on Mortgages*, vol. 2, p. 1017, 6th edition. The distinction between applications to redeem and to foreclose, as to the right of tacking, which has also the opinion of Mr. Jarman in its favour, (see *Jarman's Bythewood*, vol. 5, p. 401, 2nd edition, p. 438, 3rd edition), seems first to have been taken by Mr. Cox in his edition of *Peers Williams' Reports*, vol. 1, p. 777, (note), but the authorities there referred to relate only to other topics discussed in the note. And see *Coots on Mortgages*, p. 480, (2d edition), and Mr. Coventry's note to the above cited passage from *Powell*, (*Powell on Mortgages*, 6th edition, by Coventry, vol. 2, p. 1019, note (y)), where the existence of any such distinction is controverted.

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Ex parte
BERRIDOX
 and others.

Trebourg v. Lord Pomfret (a), and, with regard to that case, it is to be observed that there is no report of it, and that the grounds on which the Court proceeded are unknown, the only statement of the case being one made by counsel *arguendo* in the case of *Ex parte Carter* (a). Moreover it was cited in *Ex parte Bignold* (b), and, if really inconsistent with the latter authority, must be considered as overruled by it; for it cannot be inferred, from the circumstance of *Trebourg v. Lord Pomfret* not being expressly noticed in the judgment of *Ex parte Bignold*, that although cited, it was overlooked by the Court. On the other hand there is a reported case before Lord Hardwicke, that of *Sharpnell v. Hutchings* (c), which must have proceeded upon the distinction for which we contend. To understand the judgment of the Court in that case, it is necessary to remember that the law of the Court was formerly that a bond debt might be tacked to a mortgage as against the mortgagor (d). The case came on upon a bill to foreclose, and a cross bill for redemption, and the question was as to the right of the mortgagee to tack a bond to a mortgage of copyholds. The Lord Chancellor said the bond could not possibly be tacked to the mortgage, although in a subsequent part of the judgment he says, "by all the late cases a mortgagee can insist upon being paid a bond debt even against the mortgagor himself, and it is still stronger against a second mortgagee or assignees of a commission of bankruptcy." [The Chief

(a) Amb. 733.

(b) 3 M. & A. 9; 2 Dec. 88.

(c) 2 Eq. Ca. Abr. 603, pl. 34.

(d) See Coote on Mortgages, 477 (2d edit.), citing *Windham v. Jennings*, 2 Ch. Rep. 247; *Haliley v. Kirtland*, ib. 360; *Baxter v. Manning*, 1 Vern. 244; *Anon.* 3 Salk. 84.

Judge. Mr. Coote, in his note upon this judgment (a), suggests that the passage is misprinted, and that it ought to be, "a mortgagee *cannot* insist," &c. This suggestion may be thought to clear up the whole difficulty, and to reconcile the observations attributed to *Lord Hardwicke*.] The passage is, however, without so improbable an emendation, consistent with the older authorities upon the question, although not according to the law, as it has been since settled. The only ground, on which the right to tack together two wholly distinct contracts has ever been rested, or, in fact, can be rested, is the maxim, to which I have referred, that he who would have equity must do equity. It was so put in the earliest authority, in which the doctrine was acted upon, that of *St. John v. Holford* (b). And the same ground is assigned for it in the judgment in *Jones v. Smith* (c), by the Master of the Rolls, who says, "As the mortgagor cannot redeem without coming into equity, if he has pledged one estate for a sum which it is not sufficient to answer, he shall not have the other, unless he pays both debts." And the principle of the decision in *Jones v. Smith* strongly supports the distinction on which the assignees rely; for the bill there was by a debtor, who had pledged notes, bills, and Scotch mining stock for one debt, and had mortgaged an estate in Dominica for another, praying that the notes, bills, and stock, might be delivered up to the plaintiff, on his paying the amount for which they were pledged; the defendants insisted upon their right to tack; but the Court held, that it was bound to determine as a Court of law would on an action of trover for the goods, and that, therefore, the doctrine as to

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(a) *Coote on Mortgages*, 480, 2d edit.

(c) 2 Ves. jun. 376.

(b) *Cas. in Chan.* 97.

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tacking did not apply. [The *Chief Judge*. But that decision was reversed, on appeal, by the House of Lords (a).] The grounds of the reversal do not appear. But, independently of this question, the terms of the memorandum of the 29th of September 1838, do not constitute an equitable mortgage; it is a mere declaration of trust of a mortgage debt of 700*l*.

Mr. *Bacon*, in reply, was stopped by the Court.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—In this case the petitioners, strangers to the fiat, submit to the jurisdiction of the Court. It is in the power of the Court to enforce its jurisdiction against the assignees, if the Court should think it for the benefit of the estate, that the question should be decided by this jurisdiction. In the present case, I must take it for granted that the securities together are more valuable than the debts secured, inasmuch as the assignees have declined disclaiming all interest in the securities, the petitioner offering, upon their so disclaiming, to abandon all right to prove.

Viewing myself here as administering equity between the assignees and the petitioners, without adverting to the mode of application to the Court, I find the petitioners having a right to a conveyance of the legal estate in the property in which they have an equitable estate, and having a right to bring an ejectment in respect of that in which they already have a legal estate. They might, therefore, obtain possession of the latter estate; and if that were done, what would the assignees be bound to do? Why it would be their duty to take pro-

(a) See note to *Adams v. Claxton*, 6 Ven. 226.

ceedings to redeem, that is, to place themselves in such a position, that, whether the distinction now contended for be sound or not, the petitioners would be entitled to require to be redeemed as to the whole amount of both the debts.

I cannot consider such a proceeding for the benefit of the estate, when I see that, even if the objection, which has been ingeniously urged, were perfectly well founded, the state of the case is this—that the petitioners have an estate which the assignees cannot compel them to give up, without doing that for which the petitioners now ask. In such a state of things, without adverting further to the circumstance of the bankruptcy, than for the purpose of observing that it subjects the assignees to this jurisdiction, can I doubt what course is to be taken, where the estate may possibly gain something by paying off the mortgages, and can gain nothing whatever by resisting the mortgagee's claim?

According to my apprehension, *Lord Pomfret's case* was rightly decided; but, without entering more minutely into that question, it is sufficient that the general interests of the estate require the matter to be so dealt with as (in either view of the case) to entitle the petitioners to the relief which they now seek.

With respect to the other point; were it not for the bond, I should probably think the petitioners only entitled to five-sevenths of the debt of 700*l.*, or of any smaller sum, which may be realized under the deeds of September 1829, and the assignees to two-sevenths. But looking at the bond, by which, in effect, the money advanced by *Morrish* was guaranteed, it seems plain that the bankrupt was considered answerable for the sum advanced.

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The bond may have been given for 700*l.*, instead of 500*l.*, with the view of the additional 200*l.* being advanced at some future time. However that may have been, a Court of equity looks to the substance, and not the form, and it would, in my opinion, be *hasio in literâ* to say that this is a mere declaration of trust, and not an agreement, that the 500*l.* should be secured by the transfer of the debt of 700*l.* I must therefore say that it is a mortgage of the original mortgage debt, for 500*l.* and interest.

The usual Order.

Ex parte FELL.—In the matter of FELL.

Nov. 25.

The evidence at the hearing of a petition may be partly by affidavit and partly *vivâ voce*.

Leave given to the respondents to examine their own witnesses *vivâ voce*, when affidavits had been filed in support of the petition.

MR. ROLT, on behalf of the respondents, moved for a *vivâ voce* examination at the hearing of the petition, on the ground that one of the witnesses, proposed to be examined on the part of the respondents, would not make an affidavit. Affidavits had been filed on the part of the petitioner.

Mr. Swanston, and Mr. Sturgeon, for the petitioners, objected that it was too late to move for a *vivâ voce* examination, after affidavits were filed, unless by consent. When affidavits were filed, the Court, on account of the expense which would be incurred, never ordered a *vivâ voce* examination, without reading the affidavits, and being satisfied that justice required such a course to be taken. There would be this injustice here, that the respondents would have seen the petitioners' evidence before the hearing, while the petitioners would have had no opportunity of seeing that of the respondents. The

course was, for the hearing to proceed on the affidavits, and if the Court required evidence *vivâ voce*, to direct another hearing upon such evidence, but not to blend the two kinds of testimony (a).

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The CHIEF JUDGE. There is nothing in the act to prevent the two modes of examination from being blended; the act empowers the Court to take the whole, or any part of the evidence *vivâ voce* (b).

Mr. Rolt, in reply, referred to *Ex parte Baldwin* (c).

The CHIEF JUDGE.—Let the respondents be at liberty to produce for examination *vivâ voce*, at the hearing, those witnesses, whose names they shall furnish to the petitioner within five days from this time, furnishing at the same time to the petitioner a statement of the act of bankruptcy and trading, intended to be relied upon, without prejudice to the petitioner being at liberty to file further affidavits; and he is to be at liberty to produce witnesses for examination *vivâ voce*. Reserve the question, whether the respondents are to have leave to produce any other witnesses, or file farther affidavits. Let the respondents pay the petitioner 3*l*. for the costs of this application, reserving the question, whether the petitioner ought to have more, or ought to be permitted to retain that.

(a) See *Ex parte Forster*, 3 M. & A. 601; 3 Dea. 175.

(b) 1 & 2 Will. 4. c. 56. s. 38. And see *Ex parte Palmer*, 1 D. & C. 341.

(c) 1 M. & A. 617.



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Ex parte MELVILLE and others.—In the matter of
HUTTON.

Lincoln's Inn,
December 13.

Where, upon an application on the part of the respondents (the assignees), for an examination of witnesses *vidâ voce*, the petitioners objected that there was a preliminary question, which might render the matter of fact in dispute immaterial; *Held*, under all the circumstances of the case, that the respondents ought to be at liberty to examine their own witnesses *vidâ voce*, undertaking to abide personally, and otherwise, by the Order of the Court as to costs; the petitioners being at liberty to produce evidence, either by affidavit, or *vidâ voce*.

MR. RUSSELL, and Mr. Lush, on behalf of the respondents, moved for a *vivâ voce* examination of witnesses in open Court, or previously to the hearing of the petition in this case. The petition was an appeal from the rejection of a proof by the Commissioner, the question being, whether one bond had been given as a substitute for another. After the examination of several witnesses *vivâ voce*, the Commissioner decided against the proof, on the ground that the last bond was substituted for the former, saying at the same time, that his impression had been the reverse, but that the evidence proved that the impression on the minds of the parties was, that they were signing a bond, which was to be a substitute for the first bond, and his judgment was, that the last bond was the only existing and valid bond, and the only bond on which any proof could be made.

Mr. Wigram, for the petitioners, objected that there was a preliminary question, as to the competency of the parties, between whom the transaction in dispute took place, to effect a valid substitution of one security for another, and that it would be a useless expense to examine witnesses as to the acts or assertions of the parties, before the prior question was disposed of.

The CHIEF JUDGE.—I see sufficient in this case to make it right, under all the circumstances, that the assignees should be at liberty to tender for examination and to examine witnesses *vivâ voce* in open Court, they

undertaking to abide personally and otherwise by any Order which the Court may make as to costs; and the petitioners must also be at liberty to produce, if they think fit, evidence *visâ voce*, without prejudice to their right to file and use any affidavits which they may think proper.

Costs reserved.

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Ex parte TURQUAND.—In the matter of
DICKENSON.—

Westminster,
January 15,
and
February 1.

THIS was the petition of an official assignee, praying that the Court would order the creditors' assignees to indemnify him against the costs of an action at law which they had commenced, as he alleged, without his knowledge, and contrary to his wishes, and in which he was joined with them as one of the plaintiffs.

Upon an application by an official assignee to be indemnified by the creditors' assignee from the costs of a pending action, in which the name of the official assignee had been joined as a co-plaintiff without his consent, the Court offered him a reference to the Commissioner to inquire whether the action was for the benefit of the estate; and that being declined, ordered the petition to stand over till the result of the action was known.

Mr. Swanston, in support of the petition. The question is, whether the official assignee, who has no control over the appointment of the solicitor to the fiat, is to be subject to the consequences of any action which may be brought at the instigation of the solicitor by the creditors' assignees. [The *Chief Judge*. Does your affidavit state that the official assignee believes the action to be an improper one, and not likely to be attended with any benefit to the estate?] There is no affidavit to that effect; but it would be manifestly unjust, that, when the official assignee is prevented by the 1 & 2 Will. 4.

Upon the case coming on for further directions, after a

verdict obtained against the assignees, it appearing that the creditors' assignee had offered his personal indemnity for the costs of the action a year before the petition was presented, which was declined by the official assignee, the Court, upon the renewal of that undertaking by the creditors' assignees, dismissed the petition, with costs.

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c. 56. s. 23. from interfering in any way with the appointment or removal of the solicitor, or the sale of the bankrupt's property, that he should be liable for the costs of any action, in which the assignees and the solicitor may choose to join him as a co-plaintiff, without his consent. [The *Chief Judge*. The twenty-third section, which prohibits the official assignee from interfering in the appointment of a solicitor, does not prohibit him from forbidding the solicitor to bring an action in his name.] The official assignee does not wish to take this step; all he seeks is to be indemnified from the costs of an action instituted without his consent; and there are two cases decided by this Court, which appear to strengthen his claim to such an indemnity. In *Ex parte Evans* (a), it was decided that an official assignee, who had no funds in his hands, could not be compelled to join in a suit in equity with the other assignees, without being indemnified as to the costs. [The *Chief Judge*. In a suit in equity, if a trustee refuse to join as a co-plaintiff, he may be made a defendant.] The other case in favour of the present application is *Ex parte Young* (b), where the creditors' assignees had contracted to sell all the bankrupt's stock, debts, and effects; and the Court would not compel an official assignee to execute a deed containing a covenant to sue for the recovery of any of the debts, without a previous reference to the registrar to settle the form of the deed, and what indemnity he was entitled to. And in that case Sir J. Cross observed, "There is no doubt that the official assignee is entitled to an indemnity, before he becomes a party to any suit."

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Unless

(a) 3 Deac. & C. 470.

(b) 3 Mont. & A. 263; 2 Deac. 240.

you show that, in the last case cited, the creditors' assignees were ordered to indemnify the official assignee, I do not think that it applies to the prayer of this petition. If the *estate* in that case was ordered to indemnify the official assignee, I assent to the doctrine there laid down; but if the *creditors' assignees* were to indemnify him, I must beg to withhold my assent. In the present case, if I am to assume that the action is for the benefit of the estate, I shall now make no Order on this petition; but if otherwise, I will hear the other side, and make such order of reference as the circumstances may appear to call for. Do you desire any reference, Mr. *Swanston*?

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Mr. *Swanston*. I do not wish any reference as to the point whether the action is for the benefit of the estate.

The VICE-CHANCELLOR.—Then I shall assume that the action is for the benefit of the estate.

Mr. *Anderdon*, for the creditors' assignees, was stopped as to the merits, but was heard on the question of costs.

The VICE-CHANCELLOR.—Let the petition stand over for the present, with liberty for either party to apply.

The petition came on again this day for further directions. Since it was last before the Court, the action at law had been tried, when a verdict was found for the defendant; and a motion for a new trial having been refused, final judgment was entered up for the defendant. Since then, the petitioner had received a letter from the

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solicitor to the defendant, requiring prompt payment of the costs.

Mr. *Swanston*, for the official assignee. There is no suggestion, in this case, that the official assignee ever approved of or acquiesced in the action. He has no voice in the appointment of the solicitor who is employed to bring the action, and the creditors' assignee insists that he has a right to make the official assignee a plaintiff in any action which he may think proper to bring. It would be monstrous, under these circumstances, to contend that the official assignee is not entitled to an indemnity from the costs of the action.

Mr. *Anderdon*, *contrà*. The official assignee in this case took upon himself to write to the solicitor to repudiate the action, without any previous communication with the creditors' assignee. In December 1842, the latter offered him a personal indemnity; but he required a joint and several indemnity, which they would not give, but only one *pro ratâ*. He afterwards lies by during the progress of the action, while he might have applied for indemnity to the Court of law, in which the action was brought. He has never impeached the solvency of the other assignee.

His HONOUR here suggested that the attorney for the creditors' assignee should give an undertaking to pay the costs of the action, which was accordingly done.

Mr. *Anderdon*. The only question is, then, as to the costs of this petition. The official assignee has, by his acquiescence for an entire year, precluded himself from

complaining of any refusal to indemnify him, and the petition is not occasioned by any well-founded anxiety of the official assignee, as to his liability to pay the costs of the action.

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Mr. *Swanston*, in reply.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—This case must be decided on its own peculiar circumstances. The creditors' sole assignee thinks it right, for the interests of himself and the other creditors of the bankrupt, to bring an action against a particular person, and accordingly gives directions to the solicitor to the fiat for that purpose, the solicitor being an officer removable at the will solely of the creditors' assignee. A meeting of the creditors takes place at the office of the official assignee, for the purpose of taking into consideration the propriety of proceeding with the action, which meeting must be presumed to have been held with the knowledge of the official assignee. It is stated, that all the creditors then present approved of the action, and there is no evidence that any one creditor disapproved of it. When this petition was before the Court on the former occasion, the Court offered the official assignee a reference to the Commissioner, to inquire whether the action was for the benefit of the estate; but this was declined by his counsel. I must presume, therefore, that the action was properly brought, and for a proper object. Under these circumstances, was it correct in the official assignee to refuse his concurrence in the action, or to interpose in any way to obstruct it? Two species of indemnity appeared to have been offered to him in 1842; one of which was perhaps rather embarrassing, but the other

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could not be considered so. Both these proposals were declined; and the attorney then informed the official assignee that he was proceeding with the action. No application for indemnity is made to the Court of law, nor to this Court, until the end of 1843, when the official assignee presents a petition, praying, that until indemnity be given to him by the creditors' assignee,—not to the satisfaction of this Court, but to the satisfaction of himself the petitioner,—all proceedings in the action should be stayed. I am of opinion, that, under all the circumstances, there was no sufficient foundation for this petition, nor for requiring the interference of this Court in his behalf; and that, as no loss or practical inconvenience has been sustained by the official assignee, the petition was unnecessary and superfluous. The respondent, therefore, now undertaking to indemnify the official assignee from the costs of the action, without prejudice to any question as to the propriety of the action, the petition must be dismissed, with costs.



Ex parte ELIZABETH KILICK, by THOMAS SPOONER
ROWSELL, her next friend.—In the matter of CHARLES
KILICK and JOHN SADD.—

Westminster,
Jan. 17.

A testator devised and bequeathed two freehold houses to his daughter, her heirs and assigns, with all the furniture in one of the houses, "for her own sole use and benefit." Held, that these words applied to the furniture, as well as the house, and that the daughter having, after the testator's death, intermarried with K., who afterwards became a bankrupt, was entitled, as against the assignees, to the whole of the furniture for her separate use.

THIS was the petition of the wife of one of the bankrupts, appearing by her next friend, praying that the assignees might be restrained from selling and disposing of certain furniture and effects, which had been bequeathed to her, as she alleged, for her separate use,

and that the assignees might be ordered to deliver the same up to the petitioner.

By the will of *Samuel Lea Child*, the petitioner's father, bearing date the 4th June 1822, the testator devised and bequeathed to his daughter, the petitioner, after the decease of his wife, on her attaining the age of twenty-one years, a freehold estate at Mitcham, in the county of Surrey, consisting of two houses and a small cottage, with their appurtenances, to hold the same unto his said daughter, her heirs and assigns, for ever, with all the household furniture, plate, china, glass, linen, prints, and pictures, as might be in his house at Mitcham aforesaid, on the decease of his said wife, for *her own sole use and benefit*. But, if his said daughter should not have attained the age of twenty-one years, on the death of his said wife, then it was his will and desire that his executor should immediately sell and dispose of the said household furniture and effects for the most money that could be reasonably got for the same, and invest the money arising therefrom in some one of the public funds, in the name of his said executor, upon trust to pay the same to his said daughter on her attaining the age of twenty-one years; the interest and dividends thereof, and the rents and profits of his said estate, in the meantime to be applied to her maintenance and education. And it was his further will and desire, that the said messuages or tenements, and the rents, issues, and profits thereof, and the estate and interest of his said daughter therein, should not be liable to the debts, control, or engagements of any husband she might thereafter marry. The testator also devised other freehold property to his son, and he appointed his wife *Elizabeth Child*, and

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Richard Andrews, executrix and executor of his said will.

The testator died in the year 1830, without revoking or altering his will, which was duly proved by the executrix and executor.

Elizabeth Child, the widow, died in the year 1835, having had possession during her life of the household furniture and effects bequeathed by the will; and, shortly after her decease, the executor, *Richard Andrews*, died, leaving his wife, *Margaret Andrews*, his sole executrix.

The petitioner attained her age of twenty-one years in the lifetime of the testator, and in the year 1831 intermarried with the bankrupt, *Charles Killick*. In contemplation of this marriage, an indenture of settlement was executed, whereby certain real and personal estates were vested in trustees, upon trust for the separate use of the petitioner for her life, with power to dispose of the same by her will, with remainder in default of appointment to the bankrupt, *Charles Killick*, for his life, in the event of his surviving her, with divers remainders over; but the settlement did not in any manner comprise or affect the household furniture and other effects bequeathed by the will.

The petition then alleged, that, on the death of *Elizabeth Child*, the petitioner took possession of the furniture and effects, and caused them to be removed to the residence of herself and her husband at Walworth, and afterwards to their residence at Brixton, where the petitioner continued in possession thereof up to the time of her husband's bankruptcy: that in August 1843, the petitioner caused part of the furniture and effects to be removed to a house, No. 17, Trafalgar Square, New Peckham, which had been agreed to be let to the peti-

tioner's husband; and that such removal was by the sole authority of the petitioner, without any communication with the personal representative of the testator, who was not cognizant of such removal.

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On the 8th November 1843, a fiat issued against the above bankrupts, upon which the assignees took possession of all the furniture and effects, both at Brixton and at Peckham. On the 11th November following, the landlord of the house at Brixton distrained the furniture and effects there for rent, certain parts of which, belonging to the petitioner under the will, was sold to a *Mrs. Clarac*, for 51*l.* 17*s.*, which sum was furnished to her for that purpose by the petitioner, out of the annual proceeds of the real and personal estate comprised in her marriage settlement, and which had been settled to her separate use, for her life, upon her marriage. On the 2nd December 1843, the petitioner gave notice to the assignee of her claim to the furniture, and requiring him not to proceed to sell it; but the assignee had, nevertheless, advertised it for sale.

Mr. Lewin, in support of the petition. The testator in this case having given the freehold houses to his daughter for her separate use, free from the debts or engagements of any husband with whom she might intermarry, it must be inferred that he meant that the furniture in one of those houses should be enjoyed by her for her separate use, it being expressly left to her "for her own sole use and benefit." The word "sole" must have some meaning, and cannot be rejected as surplusage. In *Adamson v. Armitage (a)*, where there was a bequest to a woman of a fund, with the interest thereon, to be

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vested in trustees, the income arising therefrom to be for her "sole use and benefit," it was held that these words vested the fund itself in her for her *separate* use. So in *Ex parte Ray* (a) it was decided, that, where the property of a lady, about to marry, was settled to trustees, for "her own sole use, benefit, and disposition," it gave her a separate estate. And it also makes no difference in the present case, that the legatee was unmarried at the time of the bequest; for the limitation to "her sole use" would attach upon her marriage. This was so held in *Newlands v. Paynter* (b), where personal chattels were bequeathed to a single woman for her separate use, and without the intervention of any trustee; and it was held by Lord *Cottenham*, that they could not be seized in execution by a judgment creditor of an after-taken husband.

Mr. *Swanston*, and Mr. *Wood*, for the assignees. In the construction of a bequest of property to a woman, the marital right is not to be excluded, without a clear intention to that effect expressed by the testator. According to our interpretation of the will, the whole becomes harmonious and consistent, but not so, according to that contended for by the other side; for, where the testator meant any portion of the property to be free from the control of the husband, he says so in express words; and it may be therefore inferred, that, where he does not say so, it was not his intention to exclude the marital right. The word "sole," without any other words to explain the meaning of the testator, would certainly not give her the property for her *separate* use, free from the control of any future husband. In *Tyler v.*

(a) 1 Madd. 199.

(b) 4 Mylne & Cr. 408.

Lake (a), where lands were settled in trust to sell and distribute amongst the settlor's children, after his death, and as to the shares of such as were married, to be paid into their hands "for their own proper use and benefit," it was held, that the shares did not vest in the wives as their separate estate. [The *Chief Judge*. The words in that case are not so strong as in the present one. The limitation to "their own proper use and benefit," means to *their own use*, and nothing more.] In that case, however, it was laid down as a clear rule, that Courts of equity will not deprive the husband of his right, unless there appears a clear intention manifested to exclude him. And that rule was acted upon by Lord *Cottenham*, when Master of the Rolls, in *Massey v. Parker* (b), where a testatrix gave the interest of her residuary property to her two grand-daughters, who were both unmarried at the date of the will, and directed that the interest should be for and under "their sole control," the principal to be equally divided for the use of their surviving issue, and that their mother should have no control whatever over it; one of the grand-daughters married after the death of the testatrix, and her husband became insolvent; and it was held, that the words of the will did not indicate an intention to exclude the marital control, and that the legacy to the grand-daughter passed to her insolvent husband's assignee. And it appeared, from the judgment pronounced in that case, that, even if the words had indicated an intention to give the interest of the property to the separate use of the grand-daughter, the legacy would still have passed to the assignee of the insolvent husband; for a gift to the separate

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(a) 2 Russ. & M. 183; and see 4 Simons, 144.

(b) 2 Mylne & Keen, 174.

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use of an unmarried woman will not restrict her right of disposing in any manner of the property given, and, consequently, of giving it, if she think fit, by the act of marriage, to her husband. Now we submit in the present case, that, when the testator bequeathed the furniture to his daughter "for her own sole use and benefit," his meaning was, by those words, merely to exclude the interference of her brother with the property, and not to exclude the rights of any future husband. In *Massey v. Parker*, Lord *Cottenham* says, "it requires very distinct and unequivocal expressions to create a separate interest in the wife." The testator here could not mean by his will to give the furniture to the separate use of his daughter, free from the control of any husband she might marry; otherwise he would have expressed himself in the same terms as in the devise of the freehold property, in which he expressly declares, that the interest of his daughter in that property should "not be liable to the debts, control, or engagements of any husband she might thereafter marry." These words, therefore, cannot be treated as mere surplusage, but must be construed as manifesting a different intention in the limitation of the freehold property. All the authorities on this subject are collected in the case of *Fullett v. Armstrong* (a), where the question was, whether, where property is given to the separate use of an unmarried woman, she can be restrained from anticipating it after her subsequent marriage, by force of a prohibition to that effect in the instrument of gift.

Mr. *Lewin* was not heard in reply.

(a) 4 Mylne & Cr. 377.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I apprehend it is clear, that, when property is given to a woman, whether married or unmarried, “for her own *sole* use and benefit,” it is vested in her for her *separate* use, free from the control of the marital right. And the only question in this case is, whether, from anything to be collected from the contents of this will, a different meaning is to be given to those words. It has been argued, that a different construction must be given to those words in this case, because the testator has expressly declared that the freehold houses, without noticing the furniture, shall not be liable to the control of the husband, and that, therefore, where he devised and bequeathed the houses, with the furniture in one of them, “for the *sole* use and benefit” of his daughter, that expression must be taken to apply to the house, and not to the furniture. It appears to me, however, that those words do refer to the furniture, as well as to the house. The last observation in the argument, that those words, if applicable to the furniture, might only declare the testator’s intention that his daughter should have the furniture for her sole use, separate from any claim of her brother, is ingenious, but not, to my mind, convincing, and does not induce me to depart from the opinion I entertain, that the testator intended to give the furniture to this woman, as well as the houses, for her sole and separate use.

Mr. *Swanston* then stated, that a considerable portion of the furniture was, shortly before the bankruptcy, clandestinely removed by the husband from Brixton to Peckham. That removal, therefore, being inconsistent with the trusts of the will, it must be considered as being in

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the order and disposition of the bankrupt, and to belong to the assignees.

The VICE-CHANCELLOR.—I do not think that any case of order and disposition is made. The Order of the Court, therefore, will be to declare that the petitioner was entitled, at the time of the issuing of the fiat, to such furniture and effects as her father left to her sole use by his will, including that portion of the furniture which was sold under the distress.

Ex parte HARRY PHIPPS.—In the matter of JUKES  
COULSON and HARRY PHIPPS.—

Westminster,  
January 17.

Where the bankrupt, on a petition to annul, admits all the requisites, he is not precluded by the twenty-fourth section of the 5 & 6 Vict. c. 122, from disputing the validity of the fiat on other grounds, although twenty-one days have elapsed, after the advertisement of the bankruptcy in the Gazette, before he presented his petition.

THIS was the petition of one of the bankrupts, to annul the fiat.

Mr. *J. Russell*, for the petitioning creditor, took a preliminary objection to the hearing of the petition, on the ground that the bankrupt had not presented it within twenty-one days after the advertisement of the bankruptcy in the Gazette, as limited by the 5 & 6 Vict. c. 122. s. 24 (a).

Mr. *Swanston*, in support of the petition, said that he admitted all the requisites to support the fiat, namely, the petitioning creditor's debt, the trading, and the act of bankruptcy; but that, the petition to annul not being presented for the defect of any of those requisites, but on

(a) See Appendix, p. x.

quite a different ground, the provisions of the twenty-fourth section did not apply.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I think it my duty, certainly, with unaffected deference, to bow to the recent decision of the Lord Chancellor<sup>(a)</sup>, on the construction to be put on the restrictions imposed in the twenty-fourth section; but I feel as strongly as ever how dangerous to innocent parties a strict construction of that section might possibly become, and that individuals, not regularly liable to the bankrupt law, and withal perfectly solvent, might become irretrievably subject to the operation of a fiat. Still, I am prepared to adopt the view which has been taken, and to act upon the opinion which has been expressed by higher authority (in every sense) than my own, not only in its letter, but in its spirit. But, inasmuch as the present petitioner disavows, through his counsel, any intention of disputing the legal requisites of the present fiat, I do not think that he is precluded from petitioning this Court to annul it on other and distinct grounds, presuming, as I do, that the Lord Chancellor's decision only extended to prevent the bankrupt, after the twenty-one days, from raising any question as to the debt, trading, or act of bankruptcy. I shall be happy, however, to aid the respondents, if they deem it advisable, in bringing this matter before the Court above.

Mr. *Russell* said, that he preferred going into the case on the merits.

(a) See *Ex parte Thorold*, ante, p. 285.

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*Westminster,*  
*January*  
15, 17, & 30.

Where a bankrupt, after the commission of an act of bankruptcy, of which his bankers had notice—though not the act of bankruptcy on which the fiat issued—drew upon them various cheques in favour of several of his creditors, which cheques were duly paid by the bankers; it was held that the bankers could not prove the amount of these payments under the fiat.

Where bankers, with the knowledge of an act of bankruptcy committed by their customer, took a guarantee from a surety on his behalf, to secure to a given amount all sums then, or thereafter, to become due from the customer, but the surety had no notice of the act of bankruptcy, and afterwards paid to the bankers the full sum for which he was guarantee, without specifying to which portion of the bankers' debt the payment was to be applied; *Held*, that such payment was to go in reduction of that portion of the bankers' debt which was proveable under the fiat, and not of that which was not proveable.

**Ex parte WILLIAM HENRY SHARP**, one of the Public Officers of "THE NATIONAL PROVINCIAL BANK OF ENGLAND."—In the matter of **THOMAS MASON**.—

**THIS** was a petition on behalf of the above banking company, for the proof of a debt, which had been rejected by the Commissioner.

In November 1841, the bankrupt, who had been a miller at Ivy Bridge, in Devonshire, opened a banking account with the banking company, at their branch bank at Plymouth. On the 28th December 1841, the bankrupt, being then indebted to the bank in the sum of **864*l.* 12*s.* 1*d.***, executed and delivered a bill of sale of all his stock in trade, goods, utensils, implements, farming-stock, and effects, which were enumerated in a schedule annexed to such bill of sale, together with a policy of assurance; but no possession of the property was delivered, and the bankrupt was permitted to retain possession of it until the issuing of the fiat. Between the 28th December 1841 and the 12th February 1842, on which latter day the fiat was issued, the bankrupt paid into the branch bank, to the credit of his banking account, various sums, amounting to **1607*l.* 4*s.* 7*d.***; and the bank, during the same period, paid various cheques, drawn by the bankrupt, to the amount of **2312*l.* 5*s.* 4*d.***, in favour of several creditors of the bankrupt, which cheques were duly paid to the creditors, in satisfaction of their respective debts.

On the 10th February 1842, for the purpose of securing the debt then due from the bankrupt to the



bank, nine several guarantees by different persons were respectively signed and delivered by them to the manager of the bank, which were in the following form :

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SHARP.

“ Guarantee for an existing current banking account, in consideration that the joint stock banking company, called “ The National Provincial Bank of England,” at my request, will allow *Thomas Mason*, of Stawford Mills, near Ivy Bridge, in the county of Devon, miller, to continue to have and keep a banking account with the said joint stock banking company, and will not require immediate payment of the balance now due from him to them on such account, I do hereby undertake and agree with the said joint stock banking company, to guarantee to the said banking company, of whomsoever the same now consists, or may hereafter from time to time consist, the due payment of the said banking account, to the extent of 50*l*. And I do hereby promise and agree with the said banking company, that the said *Thomas Mason*, his executors or administrators, shall, upon demand from time to time, and at all times hereafter, reimburse, and fully pay and satisfy to the said joint stock banking company, of whomsoever the same may from time to time consist, all and every such sum or sums of money to the extent of 50*l*., as now are, or may at any time or times hereafter be, due and owing from the said *Thomas Mason*, or his executors or his administrators, to the said joint stock banking company, of whomsoever the same may consist, upon the said banking account, or any other account whatsoever; and all and every sum or sums of money which the said joint stock banking company, of whomsoever the same may consist, shall or may at any time or times have lent or advanced to the said *Thomas Mason*, to the extent of 50*l*., or have paid or

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SHARP.

become liable to pay for him ; and all and every sum or sums of money, to the extent of 50*l.*, which the said joint stock banking company may have paid, lent, or advanced to or for the said *Thomas Mason*, or have become liable to pay for the said *Thomas Mason* ; and all and every sum or sums of money, to the extent of 50*l.*, which may at any time be due to the said joint stock banking company, by reason of the said *Thomas Mason* having at any time accepted, drawn, indorsed, paid, or negotiated any bill or bills of exchange, draft or drafts, note or notes, order or orders, or other liability, security, or engagement whatsoever, and whether the same shall have been drawn, accepted, negotiated, paid, or indorsed by the said *Thomas Mason* alone, or by him jointly with any other person or persons, or by reason of the said joint stock banking company having at any time or times discounted, paid or credited, or taken or received from the said *Thomas Mason*, or from any other person or persons, and whether on or by reason of the said banking account or otherwise, any bill or note, or bills or notes, accepted, made, drawn, indorsed, or negotiated by the said *Thomas Mason*, or jointly with any other person or persons whomsoever ; and also all and every sum or sums of money, to the extent of 50*l.*, which the said joint stock banking company, or any officer or officers thereof, have laid out, paid, or advanced, or are or shall become in any wise liable to pay or advance, to any person or persons whomsoever, to, for, or on the credit of the said *Thomas Mason* alone, or jointly with any other person or persons, together with all such commissions, lawful charges, and allowances at any time due to the said joint stock banking company, upon or by reason of the said account, or for advancing or paying such bills

drafts, notes, orders, noting, liabilities, securities, and engagements, as are severally charged by bankers in such and the like cases, or as may be lawfully agreed to be paid by the said *Thomas Mason*, and also interest after the rate of five per cent. per annum for such sums as they may be in advance, or in balance against the said *Thomas Mason*, alone or jointly as aforesaid. Provided always, that this guarantee is not to extend my liability beyond the sum of 50*l*. And I further agree that this guarantee is to be a continuing one, and that if the said joint stock banking company shall at any time recover any dividend or dividends on any estate of the said *Thomas Mason*, such dividends shall not go or be taken as in discharge of any part of this guarantee, but the said company shall be entitled to recover on this guarantee to the full extent of the said sum of 50*l*., notwithstanding any such dividends. And further, that it shall and may be lawful for the said joint stock banking company at any time to compound with the said *Thomas Mason* for the whole or any portion of his liability to the said joint stock banking company, or to give him such time for paying the same, or any part thereof, as to the said joint stock banking company may seem fit, and that, without releasing or in any way affecting my liability to the said joint stock banking company under this guarantee. As witness my hand, this 10th day of February 1842."

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On the 15th February 1842, the bankrupt being indebted to the banking company in the sum of 1384*l*. 3*s*. 4*d*., they caused the stock in trade and effects comprised in the bill of sale to be sold, and received the proceeds, amounting to 452*l*. 9*s*. 9*d*.

On the 22d February 1842 the fiat issued, and the adjudication proceeded on an act of bankruptcy com-

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mitted on the 16th of February, by the bankrupt absentsenting himself on that day from his dwelling-house and place of business, although a deposition was also made before the Commissioner of the bankrupt having assigned all his property to the petitioners by the above-mentioned bill of sale.

After the issuing of the fiat, the assignees brought two actions at law against the petitioners, and obtained a verdict in one for 1607*l.* 4*s.* 7*d.*, which had been paid by him into the bank after the date of the bill of sale, and recovered in the other action for the proceeds of the effects sold by the petitioners under the bill of sale.

Under these circumstances, the bank applied to prove for the sum of 2521*l.* 13*s.* 5*d.*, being the amount of the balance due from the bankrupt at the date of the fiat, after deducting therefrom the sum of 450*l.*, which had been received by the banking company upon the guaranties; but the Commissioner held that they could only prove for 414*l.* 12*s.* 1*d.*, the balance of the account due from the bankrupt on the 28th December 1841, after deducting therefrom the 450*l.* received upon the guaranties, on the ground that the deed of the 28th December 1841 was an act of bankruptcy, and that the Commissioner was bound to assume that the adjudication proceeded upon that act of bankruptcy as well as upon the other, and, therefore, that no sums advanced or paid by the bank, subsequently to the bill of sale, were proveable under the fiat. The Commissioner, however, permitted a claim to be entered for 2107*l.* 1*s.* 4*d.*, besides the proof for 414*l.* 12*s.* 1*d.*

The petitioners contended, that the payments made by the bank on the cheques drawn by the bankrupt, after the date of the bill of sale, constituted a proveable debt,

or, at any rate, that the bank were entitled to apply the money received on the guaranties against such part of their debt as might be held not proveable, and that the amount so received under the guaranties ought not to be deducted from the sum which they might be entitled to prove.

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Mr. *Wigram*, and Mr. *Bacon*, in support of the petition. The right of proof in this case depends upon the question, whether the petitioners had notice of the act of bankruptcy on which the fiat issued; it is immaterial, whether they had notice of any prior act of bankruptcy. And this question will turn upon the construction of the 47th section of the 6 *Geo.* 4. c. 16., by which it is declared, that every person, with whom any bankrupt shall have really and *bonâ fide* contracted any debt or demand before the issuing of the commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admitted to prove the same, and be a creditor under such commission, as if no such act of bankruptcy had been committed, provided such person had not, at the time the same was committed, notice of any act of bankruptcy by such bankrupt committed. Now, in *Ex parte Bowness* (a) it was decided, that the statute of 46 *Geo.* 3. c. 135. s. 2., which is *in pari materiâ* with the 47th section of the 6 *Geo.* 4. c. 16., did not restrain a creditor from proving under a commission of bankrupt a debt contracted before the act of bankruptcy on which the commission issued, though after notice of a prior act of bankruptcy. So, in *Ex parte Birkett* (b), it was held that the relation to the act of bankruptcy could not be

(a) 2 M. & S. 479.

(b) 2 Rose, 71.

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carried back beyond the debt upon which the commission had proceeded.

There is also another point in this case, namely, whether the payments made by the petitioners on the bankrupt's cheques to various creditors of the bankrupt, after the date of the bill of sale, were *bonâ fide* payments made on behalf of the bankrupt, within the meaning of the 82nd section of the 6 Geo. 4. c. 16. By that section it is enacted, that all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission, to any creditor of the bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy, and such creditor shall not be liable to refund the same to the assignees, provided the person so dealing with the bankrupt had not, at the time of such payment, notice of any act of bankruptcy committed by the bankrupt. As the payments made, therefore, by the banking company to the several creditors of the bankrupt, were made *bonâ fide*, the petitioners contend that they ought to stand in the place of those creditors, and have a right to prove such payments under the fiat.

If, however, the Court should determine that any portion of the debt of the petitioners is not proveable, then they submit that they have a right to appropriate the payments made under the guarantie towards the reduction of that portion of the debt, and that they are not to go in reduction of the proveable portion of their debt. The rule is, as to appropriation, that when a payment is made to a creditor generally, without specifying to which part of the debt the payment is to be applied, the creditor has a right to appropriate it to such part of the debt

as he may think proper. This rule is clearly laid down by the Vice-Chancellor of England in *Bradly v. Heath* (a), in the following terms:—"Where a party makes a payment, and gives a direction with respect to its application, the payment must be applied in the manner in which he directs. But if he does not give any direction, *solvitur ad modum recipientis*." Thus in *Ex parte Haward* (b), it was determined, that where a security is deposited generally,—if the creditor has two demands, the one proveable under the commission, and the other not,—he may apply his security, in the first place, to reduce that demand which is not proveable. So in *Ex parte Hunter* (c), where a creditor had a demand against a bankrupt, consisting partly of unliquidated damages, and partly liquidated, it was held, that he might apply a security which he held, first to the former, and then to the latter, and that he might prove for the residue. The whole law, as to the application of indefinite payments, is considered by Sir William Grant in *Clayton's case* (d), where he says, that the rules were probably borrowed in the first instance from the civil law; but he admits, that the rule of the civil law, which gave the first option to the debtor of applying a payment, and the second to the creditor, to be expressed at the time of payment, has been extended by many cases, so as, in general, to authorize the creditor to make his election when he thinks fit, instead of confining it to the period of payment.

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V. C. KNIGHT BRUCE, C. J.—My impression is, that I must dismiss this petition, as to that part of it praying to prove for the amount of the payments made

(a) 3 Sim. 559.

(c) 6 Ves. 94.

(b) 1 C. B. L. 124.

(d) 1 Meriv. 605.

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by the petitioner to the bankrupt's creditors, on cheques drawn by the bankrupt on the petitioners. It is admitted, that two acts of bankruptcy have been committed by the bankrupt, the first of which was the bill of sale of the 28th December 1841, whereby the bankrupt assigned the whole of his property to the petitioners; and that the cheques in question were paid by the petitioners, after the execution of this bill of sale. I must hold, therefore, that whatever was done by the petitioners after the 28th December, was done with notice of an act of bankruptcy, and that the payments subsequently made by the petitioners cannot be proved under the fiat. But I will hear the counsel for the respondents, as to the question of appropriation.

Mr. *Swanston*, and Mr. *Paton*, for the assignees. As to the first point, the case of *Hankey v. Vernon* (a) is decisive. It was there held, that, where bankers receive and pay money on account of a bankrupt, after notice of an act of bankruptcy, all the sums received are received to the use of the estate, and they cannot set off the payments made, or be allowed to come in as creditors and to claim dividends on debts paid which were owing before the act of bankruptcy. There is no evidence of any appropriation by the petitioners of the money paid by the guarantors, to any particular portion of the debt due to the petitioners from the bankrupt. In the absence of such evidence, the rule of law appropriates it to the discharge of the earliest portion of the debt, or to that part of it in which it would be most for the interest of the party making the payment, that it should be appropriated. In *Smith v. Wigley* (b) it was decided, that, if

(a) 3 Brown, 13.

(b) 3 Moo. &amp; Sc. 175.



the creditor does not make any appropriation at the time the payment is made, it must be applied to the discharge of the earliest debt. The cases cited by the other side were all decided on the ground of acts done at the time of payment, either by the party paying, or the party receiving. Whatever option a creditor has of applying a payment to any portion of his debt, it must be exercised at the time of payment, and cannot be exercised by him at a subsequent period ; *Bodenham v. Purchas* (a). In that case, a bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor ; one of the partners died, and a new partner was taken into the firm, when a considerable balance was due from the obligor to the firm ; advances were afterwards made by the bankers, and payments made to them on account by the obligor, who was credited by the new firm with the several payments, and charged with the original debt and subsequent advances, as constituting items in one entire account ; the balance due at the time of the partner's death was thus considerably reduced, and that reduced balance, by order of the obligor, was transferred by the bankers to the account of another customer, who, with his assent, was charged with the then debt of the obligor ; the person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond ; and it was held, that, as they had not originally treated the balance due on the bond as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period ; and that, having

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(a) 2 B. & Ald. 39.

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received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, the bond was to be considered as paid. Now, we contend, in this case, that the money paid by the sureties must go in discharge of that part of the debt which was provable, and not of the portion which could not be proved; and that the sureties have a right to insist upon the payments being so appropriated. [The *Chief Judge*. Here the surety pays the *whole* sum for which he is liable. How is he then to have a right to insist upon any appropriation as to the payment?] If the payment would extinguish the whole debt of the principal debtor, it would, of course, be needless to insist upon such right; but when the payment is only in discharge of a small portion of that debt, we submit that the surety has a right to insist upon the payment being applied in the way most beneficial to himself. Thus in *Marryatt v. White (a)*, where security had been given by a surety for goods to be supplied to his principal, and not in respect of a previously existing debt, and goods were subsequently supplied, and payments were from time to time made by the principal, in respect of some of which discount was allowed for prompt payment; it was held, that it was to be inferred, in favour of the surety, that all these payments were intended in liquidation of the latter account. But, in the present case, there has been, in effect, an appropriation by the petitioners of the money paid by the sureties, towards the discharge of the provable portion of the debt, by the petitioners offering no opposition to the proofs of the sureties under the fiat.— They also cited *Clements v. Langley (b)*, where it was held that one of several co-sureties, who is compelled to

(a) 2 Star. 101.

(b) 3 B. &amp; Adol. 372.

pay the debt of the principal, after the bankruptcy of the other co-surety, cannot prove for contribution under his commission.

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Mr. *Wigram*, in reply. The terms of the guarantee are, that the guarantor shall guarantee "each and every portion" of the debt. The person guaranteed, therefore, had a right to appropriate the payment to what portion of the debt he chose. In *Marryatt v. White (a)*, which has been cited by the other side, the decision was founded on an implied agreement, from the conduct of the parties, that the payment made in that case was to be appropriated in favour of the surety. [The *Chief Judge*. That is certainly a strong case, as to the appropriation of the payment towards the liquidation of the debt, for which the surety was liable. I observe that the previous case of *Plomer v. Long (b)* is there referred to, to which is appended a note, that seems to have an important bearing upon the present question.] The guarantee, however, is very different in the present case, being not only for each and every part of the debt, but with the express stipulation that the guarantor was to have no benefit of any dividends. January 17.

V. C. KNIGHT BRUCE, C. J.—It is agreed on all hands, that on the 28th of December an act of bankruptcy was committed, by the assignment of all the bankrupt's property to the petitioners, and that at that time the guarantors had no notice of such act of bankruptcy. I must assume, also, that when the guarantees were entered into, and when the payments were made, the guarantors had no such notice. If, however, the

(a) 2 Star. 101.

(b) 1 Star. 133.

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petitioners are desirous of offering evidence on this point, they are at liberty to do so; and the case may stand adjourned to this day week, to enable them to decide whether they will adduce such evidence or not.

January 24.

The counsel for the petitioners declined to offer any such evidence, and referred the Court to *Philpot v. Jones (a)*, and *Stone v. Compton (b)*.

January 30.

V. C. KNIGHT BRUCE, C. J. now delivered the following judgment.—The order, in point of time, of the two portions of debt from the bankrupt to the petitioners, may, of itself and simply, deserve much attention in this case. But it is not all. On the 28th of December 1842, (which was previous to the guarantee), an act of bankruptcy was committed by the bankrupt, of which the petitioners had at the time actual notice. They were, in truth, directly associated with it. The petitioning creditor's debt having been incurred before that time, and having been then due, this act of bankruptcy is material for the purposes of the fiat, which was issued on the 22nd of February following. It is not proved, or alleged, that any one of the guarantors, when he gave his guarantee, or when he paid the amount of it to the petitioners, had notice of this act of bankruptcy. I cannot possibly assume that there was any such notice; especially since the petitioners have declined the opportunity, which the Court offered to give them, of producing evidence on the point. The assignees contend, that, unless the payments of 50*l.* each, which the guarantors made in full discharge of their liability under the guarantees, were made in respect of the portion of the debt

(a) 2 A. &amp; E. 41.

(b) 5 Bing. N. C. 142.

which was due before the act of bankruptcy of December, (to which, as well as to the other portion of the debt, both parties agree in construing the guarantees to extend), the proofs made by the guarantors under the fiat were improperly made, and ought not to stand. The assignees may, or may not, be right. But it being, at best, reasonably arguable that they are right in so contending, I cannot hold that it was a matter of indifference to the guarantors, whether, when they gave, or when they paid on, the guarantees, they were informed, or left in ignorance, of the act of bankruptcy of December; especially as they have already judged it to be for their interest to prove under the fiat.

Upon these facts, I think, that neither when the guarantees were given, nor when the payments under them were made, were the guarantors on equal terms with the petitioners; and if those payments were to be held applicable to the portion of the debt that was incurred after the act of bankruptcy of December, and the consequence of that were to be to render their proofs liable to be expunged, I apprehend that justice would not be done, as between the petitioners and the guarantors. This, though the guarantors are not here, is not, I think, to be disregarded upon the present occasion.

Under all the circumstances, (although it may not be certain that the validity of the proofs of the guarantors depends on the petitioners' failure in the question now before me, and although the petitioners are strangers to those proofs), I am of opinion, that the justice of this case will be best satisfied by not disturbing what the learned Commissioner has done, that is, by applying the 450*l.* received from the guarantors towards the earlier

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SHARP.

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portion of the debt. I have read the cases which were mentioned to me, and some others, with reference to the present. The report of *Stone v. Compton* (a) refers to *Pidcock v. Bishop* (b), where I found, that in my original note on this petition, I had unintentionally borrowed an expression of Mr. Justice *Holroyd*, who says there, "the plaintiff and defendant therefore were not on equal terms;" that distinguished judge goes on to say, "the former, with the knowledge of a fact, which necessarily must have the effect of increasing the responsibility of the surety, without communicating that fact to him, suffers him to give the guarantee. That was a fraud upon the defendant, and vitiates the contract." Mr. Justice *Bayley* commences his judgment on the same occasion thus: "It is the duty of a party taking a guarantee, to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglect to do so, it is at his peril." He ends it with these words, "Here the contract to guarantee is void, because a fact materially affecting the nature of the obligation created by the contract was not communicated to the surety." That case is specifically very different from the case between the petitioners and the guarantors here. Nor do I mean to intimate any opinion as to the validity, or invalidity, of the guarantees, the money secured by which has been received by the petitioners; but I may say, that the principle on which *Pidcock v. Bishop* proceeded seems not very foreign from the matter before me.

(a) 5 Bing. N. C. 142, 157.

(b) 3 B. &amp; C. 605.



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Ex parte HARRY PHIPPS.—In the matter of JUKES  
COULSON and HARRY PHIPPS.—

Westminster,  
January 22, 24,  
and 30.

**THIS** was a petition of the bankrupt, *Phipps*, to annul the fiat, on the ground that it was issued at the instance of the bankrupt *Coulson*, for the purpose of dissolving the partnership between them, and not for the purpose of distributing the effects among the creditors.

The petition stated, that by certain indentures of copartnership, bearing date the 14th February 1840, and made between the bankrupt, *Coulson*, of the one part, and the bankrupt, *Phipps*, of the other part, it was, amongst other things, agreed between them as follows:—

1st. That they should become and continue copartners in the trades or businesses of wholesale and export ironmongers and manufacturers of steam-engines, sugar mills, sugar pans, and every description of machinery, and all things incidental thereto, for the term of twenty-one years, to commence from the 1st January then last, subject nevertheless to be dissolved and determined by the mutual consent of the parties at the end of the first seven or fourteen years of the said term.

3rd. That the copartnership capital should consist of the then present capital of *Coulson*, then in the business carried on by and belonging to him, of the value of

£, and one-third of *Phipps's* share of the profits to remain in the business, towards his portion of the capital, until it should equal in amount the portion of *Coulson*; and each of the parties should be allowed interest on the portion of capital brought in by him, at the rate of 5l. per cent. per annum.

Where one of two partners, who was anxious to dissolve the partnership, procured a creditor to issue a joint fiat against the firm; and it appeared that the main object of the fiat was to effect such dissolution, and that the division of the effects among the creditors, if an object at all, was so merely in a slight and inferior degree, and was a purpose only subsidiary to the other; the fiat was held to be issued under a false colour for a concealed object, and was ordered to be annulled at the costs of the petitioning creditor and the partner who induced him to issue it.

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4th. That all monies to be received on account of the concern should be from time to time paid into the banking house of Messrs. *Hankey* and Co., in the joint names of the two bankrupts.

5th. That all cheques, drafts, and bills of exchange, and promissory notes, should be drawn, accepted, indorsed and negotiated by the parties respectively in the copartnership firm.

6th. That the parties should be equally interested in the profits, and be at liberty to draw thereupon annually, by quarterly portions, as follows (that is to say):—*Coulson* the sum of 500*l.*, *Phipps* the sum of 300*l.*, such sums to be charged against the party drawing out the same; and the parties should equally bear, pay and sustain the expenses of carrying on the business, and all losses by bad debts or otherwise.

By the 13th clause in the articles it was provided, that in the event of the retirement or decease of *Coulson*, his capital should not be withdrawn from the partnership for twelve calendar months from such retirement or decease.

And by the 14th clause it was declared, that in case either of the parties should become dissatisfied, or be mindful or desirous of retiring from the partnership, he should be at liberty to do so at the end of the first seven years, or fourteen years, of the said term, upon giving six months previous notice in writing of such his intention, and at the end of such six months the partnership should be considered as dissolved, and that an account should be then taken as directed by the articles.

The capital of *Coulson* amounted to the sum of 3716*l.* 17*s.* 11*d.*, part of which, 1719*l.* 9*s.* 9*d.*, was in money,



and the residue, viz. 1997*l.* 8*s.* 2*d.* was in stock in trade, &c., which the firm adopted at a valuation, without discount. It appeared that serious differences had for some time subsisted between the two partners, and that in May 1843, *Coulson* intimated *his* wish to put an end to the partnership, but *Phipps* refused to comply with the proposal, unless he had an adequate remuneration for the loss he should sustain by a dissolution.

On the 5th of July last *Coulson* withdrew from the bankers of the firm the whole of the balance, amounting to the sum of 751*l.* 0*s.* 3*d.*, and paid the same into the Bank of England, to his own private account, by which means the partnership was in effect stopped.

On the 30th September 1843, *Coulson* took from the counting-house the whole of the partnership books, and opened other books, and sold the partnership stock in his own name; and addressed a letter to the partnership creditors, stating that the partnership was dissolved, and that he was trading on his own account.

On the 28th September 1843, *Coulson* also wrote another circular letter to the connections of the house, as follows :—

“ I regret that the conduct of Mr. *Phipps* compels me to consider my connection with him altogether at an end; and I beg leave to acquaint you, that from this day the business of this concern will be conducted on my sole account, and I trust that I may rely on a continuance of the favours you have so long extended to my family. It is right I should mention, that I took Mr. *Phipps* into partnership, without his bringing into the concern a shilling of capital; that he then knew, and still knows, nothing of the ironmongery and machinery

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business; and that I required his services merely as a book-keeper, cashier, and assistant; and from good feeling towards him, and in the hope of insuring his best services, I allowed him half the profits. I have admissions in writing of two solicitors employed by him, that he has overdrawn his account, and I can state unhesitatingly, that all the available assets of the concern belong wholly to me. I trust, therefore, that under these circumstances you will feel no difficulty in paying to me the balance now due to the credit of the firm, and that I shall henceforth be favoured with your confidence and support. I shall thus be prepared to give the most practical contradictions to Mr. *Phipps's* statement, that the trade cannot be continued with promptitude and regularity; and as to any claims upon me, in connection with my late firm, I am prepared to liquidate them on the instant, if any such should come forward."

Yours, *Jukes Coulson.*"

Phipps also gave notice to the partnership creditors not to pay their debts to *Coulson*.

It appeared that *Coulson* had frequently, during the months of September and October, expressed to various persons his determination to dissolve the partnership by every means in his power, although he well knew that there were ample funds to satisfy all the partnership debts.

On the 11th October 1843, *Coulson* sent down a clerk of the firm, named *Stokes*, to Tipton, in Staffordshire, to see one *Samuel Mallin*, a nail factor, (who was an old friend of *Coulson*, and a creditor of the partnership to the amount of 105*l.* 7*s.* 8*d.*.) to induce him to make a demand, and summon the bankrupts, under the recent statute of 5 & 6 *Vict.* c. 122, in order that an act of bankruptcy might be com-

mitted, by neglecting to pay the debt, or to give security for the same at the end of fifteen days. On this occasion *Coulson* addressed to Mr. *Mallin* the following letter:—

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12, Clement's Lane, 11th Oct. 1843.

“ Dear Sir.—Mr. *Stokes*, my confidential clerk, will inform you of the object of my sending him down to you, he has my authority to do so; you will oblige me by doing as he will request, and I will take care you incur no expense.

I am, Dear Sir, yours, faithfully,

Jukes Coulson.”

At the time of this proceeding *Coulson* had 125*l.* 9*s.* 11*d.* of the partnership monies standing to his credit at the Bank of England.

Phipps was accordingly served with a demand, signed by *Samuel Mallin*, on the 13th October, which was followed up by a summons from one of the Commissioners of the Court of Bankruptcy to appear before him on the 25th October last, when *Phipps* attended, and protested against such proceedings, as the estate was solvent. The summons was then adjourned to the 31st October, when the Commissioner objected to any further adjournment; and the act of bankruptcy was completed on the 2nd November, the debt being unpaid and unsecured.

On the 16th November a joint fiat in bankruptcy was issued against *Coulson* and *Phipps*, on the petition of *Mallin*, under which they were declared bankrupts.

On the 1st December, one *John Brown* was chosen the creditors' assignee, who, it was alleged, was several years ago the partner of the father of *Coulson*; and the

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proceedings under the fiat were then removed from the solicitor who issued it to the solicitors of *Coulson*.

The petitioner alleged, that the partnership was not insolvent, nor embarrassed, except through the above conduct of *Coulson*, and that the petitioner himself was entitled to a beneficial interest in the surplus to arise from the debts, stock, and effects, to the amount of 747*l.* 16*s.* 2*d.*, exclusive of such sum as might be awarded to him for his loss occasioned by the breaking up of the partnership under the circumstances above mentioned.

Mr. *Swanston*, and Mr. *Sturgeon*, appeared in support of the petition.

Mr. *Anderdon* for the petitioning creditor took a preliminary objection to the prayer of the petition, contending that it was bad for multifariousness; inasmuch as the petitioner prayed to annul the fiat, or that an account might be taken of the partnership effects. The petitioner was bound to elect on which part of the prayer he would proceed.

The CHIEF JUDGE overruled the objection.

Mr. *Swanston* then proceeded.

The CHIEF JUDGE.—What allegation is there in this petition to bring the case within the doctrine of *Ex parte Gallimore* (a)? If you wish to raise the point of equitable invalidity, that is, whether the fiat was, or was not,

(a) 2 Rose, 424.

issued for the legitimate purposes of a fiat, I think that point ought to be expressly raised by the petition.

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Mr. *Swanston* craved leave to amend, for the purpose of introducing such an allegation.

Mr. *Anderdon*. The petition ought to be dismissed, without prejudice to the right of the petitioner to present another.

Mr. *J. Russell* for the assignees. The petitioner in this case lies by, the whole time from the 2nd of November to the 18th of December, to present this petition, which he must have known could not be heard until the present month, when two months having elapsed from the adjudication, no creditor could present a petition; he ought therefore to have applied to amend before.

Mr. *Bacon*, for the bankrupt *Coulson*. The length of time that this petition has been pending precludes the petitioner from this indulgence. Admitting that all the facts were not known to the petitioner at the time of presenting the petition, the affidavits which have been filed in answer to it have afforded him abundant opportunity of applying before now to amend. If, however, the amendment is permitted, it ought to be on payment of costs, with liberty for the respondents to consider how the amendment will bear on their case.

The CHIEF JUDGE.—I am of opinion, that it will be better for all parties that the point, as to the equitable invalidity of the fiat, should be raised by the petitioner. Let the petitioner therefore be permitted to amend the

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petition, by alleging that the fiat was issued by collusion for the purpose of dissolving the partnership between *Coulson* and *Phipps*, and was issued also at the instance and on the indemnity of *Coulson*. It will be for the respondents to say, whether they will consent to go on now, or whether they wish the petition to stand over, for the purpose of filing fresh affidavits.

The respondents not asking for any adjournment,

Mr. *Swanston* proceeded. It appears from the affidavits, that on the very day when the letter from *Robins* to *Coulson* arrived in London, *Stokes*, a confidential clerk of *Coulson*, leaves London the same day for the purpose of seeing *Robins* and *Mallin*, taking with him a form of the particulars of demand under the new act of 5 & 6 Vict. c. 122. s. 11., which was ready prepared, when he left London. It is stated in the petitioner's affidavit, and is not contradicted, that the demand was prepared by a solicitor under *Coulson's* directions, and that this solicitor was an entire stranger to *Mallin* and *Robins*; and that after the Commissioner's summons, *Adcock*, the solicitor, and *Coulson* were in frequent communication. No proof has been made against *Phipps's* separate estate, and only 700*l.* against *Coulson's*, the whole of which *Coulson's* interest in the joint estate would pay in full.

Mr. *J. Russell*, for the assignees. The fiat may be considered more the fiat of the petitioner himself, than that of *Coulson*; the object of the petitioner being that *Coulson's* friends should come forward to buy him out of the partnership. When *Phipps* surrendered to the fiat, he signed a written consent to the adjudication being advertised in the Gazette. It is plain that he was indifferent to,

if not desirous of, the projected bankruptcy; for, by neglecting to admit the debt of *Mallin*, on the second summons after the swearing of the affidavit of debt, he accelerated the act of bankruptcy. But, supposing that *Coulson* wished the fiat to be issued, for the purpose (among others) of getting rid of *Phipps* as a partner, yet, unless that was his sole object, or he was guilty of fraud in any part of the proceeding, the Court will not annul the fiat. It was decided in *Ex parte Wilbeam (a)*, that, although the petitioning creditor, in issuing a commission, was influenced by other motives than the mere distribution of the estate, the Court would not supersede the commission on that account, unless those motives were fraudulent.

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Mr. *Anderdon*, and Mr. *Prior*, for the petitioning creditor. The cases of *Ex parte Gallimore (b)*, and *Ex parte Bourne (c)*, are very distinguishable from this. In the first of those cases the commission was taken out by the landlord of the bankrupt to determine a lease, contrary to good faith; and in the last, as appears by Lord *Eldon's* judgment, the commission was issued by the petitioning creditor to compel the bankrupt to confirm the sale of certain property, and to defeat an action commenced by the bankrupt against him for the alleged illegal sale of the bankrupt's property. In *Ex parte Christie (d)*, Lord *Brougham* says, "There may be cases in which different motives may combine to influence the petitioning creditor; and more objects than one may be attained by a commission, and yet the Court will not interfere, if there has been no fraud or other improper conduct on the part of the petitioning creditor, notwith-

24 January.

(a) 1 Buck, 459; 5 Madd. 1.

(b) 2 Rose, 424.

(c) 2 G. & J. 137.

(d) 2 Deac. & C. 505.

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standing he may have been actuated by other motives, besides those of distributing the bankrupt's estate." What-
ever therefore may have been Mr. *Coulson's* wishes as to the determination of the partnership, the fiat cannot be impeached, unless it has been concocted in fraud. It appears, that on the 31st of October *Phipps* drew a bill for 300*l.* and upwards on a debtor to the firm, which he prevailed on him to accept, and which he afterwards got discounted, and put the proceeds in his own pocket. Now, instead of doing this, if he had applied the money in discharge of *Mallin's* debt, he would thereby have prevented the fiat. [The *Chief Judge*. In *Ex parte Bourne* (a), I perceive Lord *Eldon* refers to *Ex parte Wade* (b), which had been previously referred to by him, and in which he superseded a commission on the ground that it was an abuse of the great seal, although it was connected with the intention of distributing amongst the creditors a certain portion of the bankrupt's property. I confess I was not aware of that case.] In *Wade's* case, the facts there disclosed amounted to a breach of trust on the part of those at whose instance the commission was sued out; and it was decided, that, as the trustees themselves could not take out a commission, they could not employ others to do so. In the present case, *Coulson* did nothing more than what the law now allows every trader to do, namely, to have a fiat issued against himself; and, necessarily, against his partner also. [The *Chief Judge*. The 42nd section of the 1 & 2 *Will. 4. c. 56.* certainly declares, that a commission shall not be invalid for being concerted by the bankrupt with the petitioning creditor. But that applies to a case of individual concert of the bankrupt with the petitioning creditor, and not to the

(a) 2 G. & J. 137.

(b) 2 G. & J. 143.

case of one partner concerting a fiat against his co-partner.] The previous section, the 41st, declares that, in the construction of the act, the singular number may be received as the plural number. The 42nd section may therefore be read, as if it had declared in express words, that two partners, "or either of them," might concert the commission. [The *Chief Judge*. That argument is ingenious, but not to me convincing. Moreover I find that this interpreting clause, the 41st section, declares merely that wherever the statute "*hath* used words importing the singular number," it shall be understood to include several matters &c.; so that the clause would only seem to operate on the previous sections. It may be questionable, therefore, whether it applies to any *subsequent* section.] *Coulson* might be desirous of getting rid of his partner; but that was not the primary object of the fiat. This cannot be said to be the bankrupt's fiat. The fiat can only be called the bankrupt's, where he is to have some advantage from it, at the expense of the creditors. There is nothing therefore to impeach this fiat, as against *Coulson* himself: and if the Court should be disposed to annul it, as against *Phipps*, it may nevertheless, under the 6 Geo. 4. c. 16. s. 16., be permitted to stand, as against *Coulson*.

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Mr. *Bacon*, and Mr. *Glasse*, for the bankrupt *Coulson*. It is expressly sworn by *Coulson* in his affidavit, that he was not desirous of bankruptcy, if it could possibly have been avoided; but that *Phipps's* conduct had rendered it inevitable. It has evidently been the intention of the legislature, of late years, to give greater facility to a trader to procure himself to be made a bankrupt. The first innovation on the old law on this subject is to

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be found in the 6 *Geo.* 4. c. 16. s. 7., which declared that no commission, under which the adjudication should be grounded on the act of bankruptcy, of filing a declaration by the bankrupt of his insolvency in the bankrupt office, should be deemed invalid, by reason of such declaration having been concerted or agreed upon between the bankrupt and any creditor, or other person. Then came the 1 & 2 *Will.* 4. c. 56. s. 42., which declared that no commission should be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication had been concerted between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them. And, lastly, by the recent act of the 5 & 6 *Vict.* c. 122. s. 8., no fiat is now to be deemed invalid, by reason of any act of bankruptcy having been concerted or agreed upon between the bankrupt and any creditor, or other person. It cannot be disputed, therefore, that a trader may now concert a fiat, or an act of bankruptcy, against himself with the petitioning creditor, although his object is to be made a bankrupt. [The *Chief Judge*. The real object must be the avowed object.] We submit, that the real purpose of *Coulson* in this case was to administer the partnership effects, which could not be done, unless a joint fiat was issued against both partners. But to induce the Court to annul a fiat, on the bankrupt's suggestion that the object of the petitioning creditor in issuing it was to dissolve a partnership subsisting between the bankrupt and any other person, the Court must be quite satisfied that that was the sole object of the petitioning creditor; *Ex parte Parkes* (a). Now,

(a) 3 Deac. 31.

in the present case, it is impossible to contend that the sole object of *Mallin* the petitioning creditor, was to dissolve the partnership between *Coulson* and *Phipps*. What he wanted was the payment of his debt. In *Ex parte Staff* (a), Lord *Eldon* said, that in the then last session of parliament it had been much canvassed, whether the legislature should not give every trader a power to make himself a bankrupt, and that it might be very right so to do. The legislature has now given the bankrupt such a power; and therefore no fiat can be annulled on that ground, except in the case of fraud, which there is no pretence for imputing in the present case.

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Mr. *Swanston*, in reply. If *Coulson* wished so much to dissolve the partnership and distribute the partnership assets, why did he not pursue the proper course by filing a bill in chancery against his partner; when that object might have been easily obtained. But the abandonment of all proceedings of this kind by him shows that he had no merits. *Phipps* thought that the conduct of *Coulson*, in procuring *Mallin* to take the steps he did under the 5 & 6 *Vict.* c. 122. s. 11., was altogether an unlawful proceeding; and therefore did not think it right to conform to the requisitions of the act of parliament. He urged this objection before the Commissioner. As to the observation that *Phipps* surrendered to the fiat, and signed a consent to the adjudication being advertized in the *Gazette*, he could have obtained no protection, unless he had surrendered, and, in signing the consent to the advertisement, he merely complied with the common printed form.

(a) Buck, 441.

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V. C. KNIGHT BRUCE, C. J.—Upon referring to the proceedings, I find that the act of bankruptcy, on which the adjudication proceeded in regard to *Coulson*, was quite different from that founded on the service of the demand of the petitioning creditor's debt under the 5 & 6 Vict. c. 122. s. 11. The act of bankruptcy proved against *Coulson* is founded on a letter written by him to *Stokes*, announcing his intention to absent himself from his counting-house, which letter was followed by an actual absence. I will read the affidavits and consider of my judgment.

30 January. V. C. KNIGHT BRUCE, C. J., now delivered the following judgment:

The substantial question before me is, whether the fiat against Mr. *Coulson* and Mr. *Phipps* has been issued in fraud or abuse of the bankrupt laws—a question raised under circumstances rendering the impropriety, if any, of the conduct of either towards the other, before the material date of the 11th of October last, and the state of the accounts between them, not very material to be considered, otherwise than as tending to show the probability or improbability of Mr. *Coulson* having wished to terminate their connection. That there were serious differences between them, is clear. These rose to such a height, and extended so far, as materially to affect the operations of the partnership. This, also, cannot be doubted. Nor is there any room to disbelieve that they had the effect of preventing payment, in the due and regular course, of ordinary debts due from the firm. By the fault of which of them this most inconvenient and most undesirable state of things arose, is a point unnecessary to be minutely considered. There is some con-

flict upon the affidavits. The impression, which together they have made on my mind, certainly is, that at the outset of the disputes Mr. *Coulson* was rather in the wrong, than Mr. *Phipps*; that in the progress of the quarrel, as in quarrels it generally happens, each had some cause probably to complain of the other; but that the beginning was, as I have said, on Mr. *Coulson's* side. However this may have been,—on very bad terms, unquestionably, they came to be. And whether cause or effect, it is not only probable that Mr. *Coulson* should have wished, but I think it proved that he did wish, to terminate the connection by dissolving the partnership; which was for a term of years unexpired, without any power given by the partnership articles to either, to dissolve it sooner than the end of the year 1846, as I collect. It is plain, however, that if the conduct of *Phipps* towards *Coulson*, as his partner, was such as the respondent's arguments (I do not say the affidavits) have represented it to be, *Coulson* had a case on which he could have filed a bill for a dissolution, an injunction, and a receiver. This, however, he did not do. I am not aware, that, besides the two demands under the recent statute, which form so prominent a part of the case, more than two applications for debts due from the firm are proved to have been made. One of them, from Messrs. *Oliverson & Co.*, on behalf of Mr. *Clinch*, in September, gave a hint of bankruptcy; but it does not appear that they or Mr. *Clinch* took any steps. The other was Mr. *Robins's* letter of the 10th of October 1843, which having been received on the 11th, Mr. *Coulson*, on that or the following day, has recourse to Mr. *Adcock*, a solicitor, who, as I collect, was not the solicitor of the firm, was not Mr.

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Coulson's ordinary private solicitor, and is not proved to have been on any other occasion consulted or employed by Mr. *Coulson*. Mr. *Adcock*, upon Mr. *Coulson's* instructions, prepares the two demands so often mentioned in the case, by filling up two printed forms, which, as I collect, Mr. *Coulson*, or Mr. *Adcock* for him, delivers to Mr. *Stokes*, a clerk in the service of the firm, who on the 12th or 13th of October, by Mr. *Coulson's* orders, departs for Staffordshire, carrying with him the two demands, and the letter to Mr. *Mallin*, which is in evidence. Mr. *Robins* and Mr. *Mallin* sign the two demands presented to them for the purpose by *Stokes*, who then takes them back to London; and they form, or that signed by *Mallin* forms, the foundation, at least against *Phipps*, upon which *Mallin* issued the present fiat on the 16th of November. *Mallin*, as I have said, appears never to have demanded his debt in any other manner; nor does there appear to me any reason to believe, that, before he saw *Stokes* on the 12th or 13th of October, he was anxious or uneasy on the subject, or had been thinking of making a demand for it, or that, but for the letter from *Coulson*, of which *Stokes* was the bearer, *Mallin* would have signed the paper in question. That letter was thus, [His Honour here read the letter from *Coulson* to *Mallin*, of the 11th October.] I repeat, that, in my judgment, this letter, and *Mallin's* demand, which led to the fiat, were closely and intimately connected together. I cannot sever the demand from the fiat, which must, in my opinion, be considered as associated with the letter. Mr. *Adcock*, who prepared the demand, acted upon it, proceeded under it, and issued the fiat produced by it. There is every reason to believe that he had never, and

has never, been concerned substantially, or nominally, for *Mallin* in any other business or transaction, but was a stranger to him on the 12th and 13th of October, on one of which days he signed the demand; nor have I reason to suppose, that, before the docket papers were prepared, any communication of any kind ever passed between them, except the authority, if any such, through *Stokes* on that day. Mr. *Adcock* has not made an affidavit.

Under these circumstances, I find it impossible to arrive, upon the whole evidence before me, at any other conclusion, than that the fiat was procured and issued upon the wish, request, and indemnity, and for the purposes of *Coulson*, and was substantially and solidly his fiat, and not the fiat of *Mallin*. That he did not know—if he did not know—what were *Coulson's* views and objects in this proceeding, is, in my judgment, not in this case material,—being (as I am) of opinion, that *Mallin* made himself the instrument of *Coulson*, and cannot be taken, upon a reasonable view of the whole evidence, to have had the benefit of the creditors of the two partners, whether joint or separate, in view. What, then, was the object or purpose of Mr. *Coulson*? In my opinion, it must be taken to have been chiefly and mainly, if not solely, the effectual termination of the connection between himself and Mr. *Phipps*—in other words, the dissolution of the partnership. I think that the payment of the creditors, if an object with him at all, was so in a slight and inferior degree merely,—was a purpose only subsidiary to the other,—a question, with reference to which Mr. *Coulson's* circular letter of the 28th of September (among other matters in the affidavits) seems to deserve

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attention. It is thus : [His Honour here read the letter.] The concluding paragraph is especially remarkable, when placed in comparison with some statements that Mr. *Coulson* has made.

Upon a view of the whole case, I must hold that the fiat was issued (I do not use the words offensively) under a false colour for a concealed object, in fraud and abuse of the bankrupt laws, and cannot therefore stand. It has been argued, that there has been improper delay on the part of the petitioner, and that his conduct shows acquiescence. The delay alone, recollecting the affidavit of the 25th of October, and that the petition was presented on the 18th of December, is not, I think, considerable or material. That Mr. *Phipps*, by a consent which he signed, accelerated the insertion of the advertisement of the bankruptcy in the *Gazette*, was a circumstance that struck me more. On the whole, however, I do not conceive that he ever intended to submit to the fiat, or that he created that impression upon the minds of the respondents. The fiat must, I think, be annulled at the costs of Mr. *Mallin* and Mr. *Coulson*—annulled, I mean, as to both bankrupts, and not as to *Phipps* only.

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Coram Sir G. Ross, Lincoln's Inn, Feb. 3 and 4; Serjeant's Inn, February 17; and at the Master's Office, Southampton Buildings, Feb. 20 and 21.

Ex parte PETER BRUCE TURNER and GEORGE HENSMAN.—In the matter of **JOHN MARTIN.**

THIS was a petition for the committal of one of the solicitors to the fiat, for contempt of Court.

At the choice of assignees, a compromise had been entered into between the contending parties, according to the terms of which, two distinct firms of solicitors were to act jointly as solicitors to the fiat, subject to an agreement as to the mode in which the business relating to the fiat was to be divided between the two firms as to the emoluments, and otherwise. In February 1843, the bills of costs having been taxed by the Commissioner, a petition for retaxation was presented by Mr. *Glaister*, one of the assignees; and upon this petition, and a motion on behalf of Mr. *Lambert*, Mr. *Glaister's* (a) co-assignee, an Order was made for retaxation, and for the examination of the solicitors before the Commissioner. On the 11th December 1843, the matter was again brought before the Court, upon a petition for further directions; and on December 21st 1843 an order was made. After the minutes of the Order had been given out, and before they were finally settled, or the Order

A petition for the committal of a person for publishing insulting observations on the Court of Review, and on parties engaged in litigation before it, with reference to proceedings on a particular bankruptcy, is properly entitled in the matter of such bankruptcy.

The Court of Review has jurisdiction to commit for such a publication, as a contempt, and may make the order for committal, upon the petition of the parties aggrieved, and may by such order direct the person committed to pay all petitioner's costs, charges, and expenses.

(a) See *Ex parte Glaister*, ante, p. 253.

The publication of the observations respecting the petitioners in such a case was held to be, of itself, a contempt of Court, and the Court refused to discharge the person committed, until he apologized, as well with regard to the petitioners, as with regard to the Court itself.

Held also, that an offer to prove the truth of the observations, if the petitioners would proceed upon them as a libel, was an aggravation of the contempt.

A petition on which judgment has been finally pronounced, but on which the Order has not been drawn up, held a pending proceeding, for the purpose of rendering the publication a contempt of Court, even if the actual pendency of a proceeding is requisite to give the Court jurisdiction to commit; but *semble* that such pendency is not requisite.

A compromise of a contest for the choice of assignees, by which the business of the bankruptcy was divided between two distinct firms of solicitors, who were to be jointly appointed solicitors to the fiat, strongly disapproved of by the Court.

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drawn up, Mr. *Van Sandau*, one of the solicitors to the fiat, caused to be printed a paper endorsed as follows :—

“ *Re John Martin*, a bankrupt, *Ex parte William Mungo Glaister*.

“ A statement of extraordinary frauds practised in this bankruptcy, showing how such frauds are now facilitated and encouraged, and how they might be prevented. By *A. Van Sandau*, attorney at law. London : printed by *Houghton & Co.*, 30, Poultry.”

It appeared that a copy of this pamphlet was handed by Mr. *Van Sandau* to the registrar, in the presence of Mr. *Turner*, at a meeting at the registrar's office to settle the minutes, that another copy was handed by him to a solicitor who happened to be in the office at the time, and that afterwards Mr. *Van Sandau*, at a hearing of the former petition upon the minutes in the Court of Review, handed in Court copies of the pamphlet to various persons who were attending there. Copies had also been sent by Mr. *Van Sandau's* direction to the Commissioners, deputy-registrars official assignees, and messengers of the Court of Bankruptcy. The circulation of this pamphlet was the contempt which formed the subject of the present petition; the passages principally insisted upon being the following :—

“ *A short Statement of Frauds, by which the Public are robbed under Fiats in Bankruptcy, and by which the Profession of the Law is brought into disrepute.*

“ *Re JOHN MARTIN, a Bankrupt, Ex parte WILLIAM MUNGO GLAISTER.*

“ IN the conviction that much public good may result from the publication of the following statement, and that it cannot fail to interest the mercantile community, whilst the writer is certain that all the respectable practitioners of the law will rejoice in the exposure of those abuses by which their profession is brought into bad odour, the

writer offers this short statement to the public, pledging his honour and character for the truth of every word of it; and he is the more strongly induced to give publicity to the matter, inasmuch as by the recent decision of the Court of Review therein (from which decision there is unfortunately no appeal) he cannot but feel that a veil has been cast over detected fraud and perjury, and that solicitors who are disposed (regardless of their pecuniary interests) to elevate their profession by exposing gross frauds, and by pointing out to the attention of the Court, with the view to their removal, the existing facilities which are afforded to the dishonest practitioners of the law, are deterred from pursuing such objects.

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“ Mr. *Cumming*, who is now the writer's partner, when carrying on business on his sole account, (being retained by many creditors of *John Martin*, whose debts amounted to 5000*l.* and upwards,) consented to become the joint solicitor, under the fiat against *Martin*, rather than contest for the exclusive solicitorship with *Turner* and *Hensman*. Mr. *Glaister*, the client of *Turner* and *Hensman*, and Mr. *Lambert*, the client of Mr. *Cumming*, were chosen the assignees, and thenceforward *Turner* and *Hensman* acted as the more ostensible solicitors under the fiat; but the business to be done under it was divided, *Turner* and *Hensman* taking the conduct of three cases of fraudulent preference, or of that nature, (which they selected,) leaving three other similar cases to the management of Mr. *Cumming*, and each solicitor conducted his own cases without assistance from the other. *Cumming*, or *Van Sandau* and *Cumming*, after their partnership, conducted the three last-mentioned cases, so that, at the cost of not more than 115*l.* to the bankrupt's estate, they obtained for the estate, in three distinct matters, the sum of 644*l.* 14*s.*, and the abandonment of a claim against the estate, amounting to 500*l.* and upwards, whilst *Turner* and *Hensman* conducted their three cases, so that they recovered in one case 312*l.*, at the cost in that case alone of not less than 469*l.* 16*s.* 9*d.*, constituted as is hereinafter stated; had a verdict against the assignees in another case, in which the claim was 208*l.*, or thereabouts, obtaining out of the estate, for the costs of their unsuccessful proceedings in that case, no less than 402*l.* 5*s.* 3*d.*; and got for the costs of another action for 50*l.*, which was never taken to trial, no less than 91*l.* 12*s.* 6*d.*”

After setting forth some statements with reference to alleged overcharges in Messrs. *Turner* and *Hensman*'s portion of the business, and with reference to the proceedings on the original taxation, the paper proceeded as follows:—“ Subsequently, on the 10th February, Messrs. *Turner* and *Hensman*, by their then friend Mr. *Glaister*, pre-

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sented his petition, praying the retaxation of the bill of costs, therein treated as the bill of Messrs. *Turner* and *Hensman*, and Mr. *Cumming*; and thereby, under the mask of a retaxation, sought to hide the obliquities which the writer has herein shortly stated, and which he had declared his intention of laying before the Court of Review: the writer then, and in order to bring the matter fairly and fully under the attention of that Court, and also to punish the guilty, and to effect the reform which will be presently suggested, told the tale in affidavit, and made a motion in the Court of Review, to be heard at the same time as *Glaister's* or *Turner* and *Hensman's* petition, that *Turner* and *Hensman* might answer those affidavits, seeking full investigation, and the removal, if necessary, of Mr. *Glaister*, who had allowed himself to be made their cat's-paw, from the assigneeship.

"The bills of costs were then as a matter of course ordered to be retaxed, and they were retaxed under the writer's superintendence, and were, upon that retaxation, reduced by the large sum of 445*l.* 17*s.* 5*d.*, of which about 240*l.* consisted of *Turner* and *Hensman's* falsely alleged disbursements, and the residue principally of *Turner* and *Hensman's* charges for falsely alleged attendances, and for pretended briefs, cases, &c.

"Such, then, being the admitted or undisputed facts of the case, what is the justification or excuse of Messrs. *Turner* and *Hensman*? Their excuse is (and it has satisfied Sir *Knight Bruce*) that *Turner* and *Hensman's* clerk, *Charles King*, robbed and perjured himself for their benefit, keeping them in ignorance of the benefits which they derived at his hands; but why he so did, *Turner* and *Hensman* have sworn they do not know!

"On the subjects of these frauds, it is not now necessary to say more; but to develope, in a few words, how it happens that such frauds can be effected, and to point out the reform which the writer has sought to bring about, the following short statement will suffice:—It so happens that, till lately, the costs in bankruptcy were taxed by the deputy registrars attached to the respective Courts of the several Commissioners, and undue amounts were occasionally, from carelessness, allowed by them; but now the general costs in bankruptcy are vigilantly taxed by Mr. *Richardson*, the able taxing master of the Court of Bankruptcy, and he requires all which comes under his notice to be duly vouched. But the common law bills in bankruptcy were and still are referred to the masters of the common law courts, who, taxing between the attorney and the estate, use no vigilance, hardly require any voucher, take the word of the attorney or the attorney's clerk who attend them for alleged payments; and consequently, whilst the

honest attorney only charges and gets his due, the knaves who will speak falsely and rob, may get, as in the case under consideration, for alleged disbursements, amounts allowed which have never been paid. Now the writer, in common with every honest attorney, deprecates that practice; and he, consequently, in the name of the respectable body of solicitors, sought to induce Sir *Knight Bruce* to correct that practice, but that learned judge professes to believe the unsupported oath of Messrs. *Turner* and *Hensman*, that they were entirely ignorant of their clerk's dishonesty, although it was in effect distinctly sworn, and was uncontradicted, that they had pocketed all the booty obtained by the instrumentality of their clerk, *Charles King*, (save that they had paid, under the circumstances, to Mr. *Cumming*, or to *Van Sandau* and *Cumming*, one moiety of the apparent net profits, which they were always willing and offered to refund under the direction of the Court,) treated the matter as an immaterial one, and, after it was part heard, declared it was of such little importance that it mattered not if the case was then heard, or if it were heard that day twelve months; and has, without suggesting any remedy for the palpable abuse shown in this case, contented himself with saying that it was the duty of the taxing master to stand between the solicitor and the estate, and by declaring that in his judgment Messrs. *Turner* and *Hensman's* professional honour was unimpeached, and that they were only reproachable with great carelessness, ordering them to pay the costs of Mr. *Glaister's* petition and of the retaxation, giving to Mr. *Glaister*, who had so kindly lent his name as the petitioner for Messrs. *Turner* and *Hensman's* purposes, the costs of the motion by which the frauds were exposed as against the writer's client, leaving the writer's client or the writer who had exposed the frauds, and had thus been the means of bringing back the plunder into the estate, out of his own pocket to pay the costs of his proceedings, by which alone the frauds had been exposed: the judge of the Court of Review stating, it is presumed, as the reason for thus punishing him, that the writer had not proceeded in the most economical way, and perhaps not quite regularly, but in what respect he was irregular the judge did not condescend to point out.

"As it is not the writer's intention to extend this statement, he will not enlarge for his own justification, but will content himself with saying, that he believes he was not guilty of any unnecessary prolixity, and that all which he had stated in his affidavits was necessary for the development of the truth; for showing that he had neither proceeded hastily, nor with bad feeling or taste in the matter; and that if he did not proceed economically, no costs which he could possibly have got allowed to him could possibly have repaid him for the time and the labour

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which he was obliged to bestow in the performance of the unpleasant duty he had taken on himself, or for the annoyance to which he was exposed. The writer, therefore, has been punished for his disinterestedness, whilst Messrs. *Turner* and *Hensman* have been white-washed in the Court of Review, the detected and admitted frauds being put off on their scapegoat, *Charles King*, by whose perjury and instrumentality Messrs. *Turner* and *Hensman* were so materially enriched; and even that scapegoat has been allowed to remain unpunished, and, it may be said, almost uncensured by the Court of Review, which has acquitted Messrs. *Turner* and *Hensman* of every thing but 'great carelessness;' that is, of a carelessness by which, to use the language of Mr. *Gluister's* petition, they profited so largely 'by inadvertence or otherwise.'

"The writer will now add, that if he and his partner had been disposed to let the matter pass without scrutiny, they would have been left in the enjoyment of the 111*l.* 19*s.*, their proportion of the apparent net profits, consequent on *Turner* and *Hensman's* improper charges for pretended attendances, briefs and cases, of which they have voluntarily taken on themselves the repayment. Messrs. *Turner* and *Hensman* would have retained the 334*l.*, or thereabouts, which they have been, or will be, obliged to refund, and the writer would have saved himself an infinity of trouble, and have incurred no expense of time, labour, or money, whereas by his interference, induced by hatred of fraud, and a desire to relieve himself and partner from the supposition that they would knowingly participate in undue plunder, their client, Mr. *Lambert*, or they, will be heavily mulct of costs, which Sir *Knight Bruce* took especial care to order should not be paid out of the bankrupt's estate.

"Of the judgment, it is unnecessary to write further than that it was an elaborate production, wholly besides the merits of the case, free from all allusions to the facts or statements in the affidavits, which it is but charity to suppose were never referred to by the judge; free from all denunciation against fraud; and that the only object of it seems to have been, to deter solicitors from every attempt to expose and correct abuses in bankruptcies; that the draft of it, which denoted the labour of the judge in its concoction, was delivered to the registrar, under the most solemn injunction, that it should not be shown to anybody, 'lest it should expose the working of the mind of the judge.' But of the Order, it may be predicated that, when drawn up, it will prove a chaotic jumble, productive of further litigation, expense and annoyance, and an effectual preventive against disinterestedness at least in bankruptcy on the part of honest solicitors; and such are the

advantages resulting from a Court, from which, it may be said, there is no appeal."

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The prayer of the present petition was, that Mr. *Van Sandau* might immediately stand committed to the Queen's Prison for contempt, and that a warrant might issue for that purpose, and that he might pay the petitioner's costs, charges, and expenses of the present application and incident thereto, and might be removed from off the roll of the attornies or solicitors of the Court of Bankruptcy.

The petition was supported by an affidavit, and in opposition to it an affidavit was made by Mr. *Van Sandau*, in which he stated, that, feeling deeply aggrieved by the Order made in *Ex parte Glaister*, on the 21st December last, and feeling that he and his partner were thereby not only exposed to great pecuniary loss, but likewise to injury, in the estimation of their clients and of the public; and conscientiously believing, as he still believed, that the effect of the judgment would be to deter solicitors from taking proper measures for the exposure of those frauds that might come under their attention, and that the interests of the mercantile community were thereby exposed to great detriment, the deponent did, on the morning of the 22nd of December, immediately after reading the report of the judgment in the Times newspaper, write the substance of the printed paper annexed to the petition in this matter, in the shape of a letter to the editor of the Times newspaper, and then, so soon as he could get the same copied, sent such letter to the Times newspaper office, with the extract of the affidavit of *Richard Cumming*, showing the results of retaxation of the costs therein mentioned, as the same bore on the charges of himself and *Turner* and *Hensman* respectively; and then offered, if required, to send to the said

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editor an entire brief of all the affidavits in the matter. That subsequently, on the morning of the 30th day of December, the deponent received back his papers with a note from the editor of the Times newspaper politely declining to take up the matter; and that thereupon the deponent, whilst still smarting under the Order, immediately altered his letter to the editor into the shape of a statement for publication, and immediately, and on the morning of the same day, gave it to be printed, and afterwards gratuitously distributed a considerable number of the printed statements, and that in so doing the deponent sought to set himself and his partner right in the estimation of their clients and the public, and by exposing to induce some general rule preventive of like frauds as those which the deponent had brought to light and exposed. That by his publication the deponent in truth courted, so far as Messrs. *Turner* and *Hensman* were concerned, the opportunity of proving its truth by daring them to bring an action, or to prosecute the deponent for libel; but the deponent most solemnly and positively stated that he did not distribute the paper with the view thereby to vilify and bring into contempt the Court, or the proceedings thereof. The deponent positively denied that such printed statement contains any false, scandalous, and defamatory matter of or concerning the Court, and the proceedings, order, and judgment of the Court, or concerning Messrs. *Turner* and *Hensman*; but on the contrary, he said that every word in the printed statement, and particularly every word thereof, so far as they related to *Turner* and *Hensman*, was true and just, but that, the deponent's attention having been called thereto, he believed he might have used certain ill selected and unmeasured words and expressions which might appear to impute a corrupt motive to the Chief Judge; never-

theless the deponent did not intend to impute, and that he did not and could not imagine that the said Chief Judge had or was actuated by any corrupt motive whatever, but only meant and intended to criticise and point out what deponent verily believed to be the injurious tendency of the judgment.

The affidavit proceeded to state that the deponent had written and sent to the Chief Judge the following letter:—

“ To the Right Honourable Sir J. L. Knight Bruce.

“ Sir,

“ I did not earlier communicate to your Honour the inclosed printed paper, because, although I felt convinced it would reach your hands, I thought if I communicated it to you I might be considered guilty of an act of indecency towards you, but I now venture to call your attention to it, because I am told some of the expressions used by me might warrant a misapprehension. Whilst smarting under your Honour's judgment, ‘ *In re Martin Ex parte Glaister*,’ I wrote and sent to the press the inclosed, which I have since circulated, courting, so far as *Turner and Hensman* are concerned, the opportunity of proving its truth, by daring them to bring an action against or to prosecute me for libel, or in the alternative obliging them to admit (by leaving unchallenged) its truth. At the same time I ventured boldly to criticise the judgment. I have recently had occasion to instruct Mr. *Bagshawe* to speak to the minutes, and being apprehensive that upon that occasion opportunity would be taken to call your Honour's attention to my publication, I deemed it proper to hand to that learned gentleman a copy of the inclosed, instructing him to state, if allusion were made to it, that I was willing, if sued for an alleged libel, to plead truth as my justification. Mr. *Bagshawe* has however pointed out that some of the expressions by which I criticised your Honour's judgment might be construed to be a contempt of your Court, and to impute to your Honour corrupt motives; and I consequently, as nothing was more foreign from my mind than to impugn your motives or to be guilty of contempt of Court, deem it proper to disclaim most solemnly any such intention, offering, if you desire it, in any way to publish such disclaimer. I would indeed have published a second edition of the inclosed, with a note stating that my attention had been called to the passages referred to, and declaring that I only intended to express my notion of the effect of the judgment, and not to impute to you motives which could not possibly have actuated you, did I not think that such a repudiation

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might appear to be an acknowledgment that I had the object, which I solemnly disavow, and be in itself more offensive to your Honour than what I had already published.

"I have the honour, &c.

"A. Van Sandau."

"27, King-street, Cheapside, 18th January 1844."

Mr. Swanston, Mr. Thesiger, Mr. James Russell, and Mr. Simon, in support of the petition. There can be no doubt either that the respondent has been guilty of a high contempt of the Court, or that this Court has the power to commit for such a contempt. In *Wyatt's Practical Register* (a), contempt is thus defined, "a contempt is a disobedience to the Court, or an opposing or despising the authority, justice, or dignity thereof." "Sometimes it arises by one or more there opposing or disturbing the execution or service of the process of the Court, or using force to the party that serves it; sometimes by using words importing scorn, reproach, or diminution of the Court, its process, orders, officers or ministers upon executing or serving such process or orders." So in *Viner's Abridgement* (b), contempt is described as "a disobedience to the Court, or a despising the authority, justice or dignity thereof." In *Pool v. Sacheverel* (c), a person was committed for contempt who had published an advertisement, offering a reward to any person who should legally prove a certain alleged marriage to have taken place. In the matter of *Reid* (d), Lord Hardwicke says, "There are three different sorts of contempt, one kind of contempt is scandalizing the Court itself. There may be likewise a contempt of this Court in abusing parties who are concerned in causes here. There may be also a contempt of this Court in prejudicing mankind

(a) p. 133.

(b) Title Contempt, A.

(c) 1 P. Wms. 676.

(d) 2 Atk. 469

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against persons before their cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters." The respondent in this case falls within the two former of the descriptions given by Lord *Hardwicke*. The attack contained in this pamphlet is not merely general, but so contrived that it would if successful neutralize the order which the Court has pronounced. In *Ex parte Jones* (a), the committee of a lunatic had published a pamphlet reflecting on the conduct of the petitioners and others, acting in the management of the lunatic's affairs under the orders of the Court. Lord *Erskine* said, "It never has been or can be denied, that a publication, not only with an obvious tendency, but with the design to obstruct the course of justice, is a very high contempt. Lord *Hardwicke* considered persons concerned in the business of the Court as being under the protection of the Court, and not to be driven to other remedies against libels upon them in that respect." And the committee and his wife, who had avowed the authorship of the pamphlet, as well as the printer, were all ordered to be committed to the Fleet.

Nor can there be any doubt as to the authority of this Court to commit, even independently of the recent act, 5 & 6 *Vict. c. 122. s. 66.*, (which is however conclusive upon the point). In the case of *Miller v. Knox* (b), before the House of Lords, Baron *Parke* says, "The power which Courts have of vindicating their own authority by punishing contempt committed in or out of Court is coeval with the common law, and stands upon immemorial usage, for which I would refer to *The King v.*

(a) 13 *Ves.* 237.(b) 4 *Bing. N. C.* 614.

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Almon (a). And in the same case Justice *Littledale* entirely agreed that if a contempt of Court were committed, the power to commit for contempt was coeval with the foundation of our courts of justice, and necessary to give effect and respect to their proceedings. The opinion of C. J. *Wilmot*, referred to by Mr. Baron *Parke*, was a written judgment, though not delivered in Court, (the matter having been dropped); it was prepared, after argument, on a rule to show cause why an attachment for contempt should not issue against one *Almon*, for publishing a pamphlet attacking Lord *Mansfield* in respect of a judicial act done by him at his private house. Lord C. J. *Wilmot* says (b), "It has been argued that the mode of proceeding by attachment is an invasion upon the ancient simplicity of the law, that it took its rise from the statute of Westminster, c. 2, and *Gilbert's History of the Practice of the Court of Common Pleas* is cited to prove that position. And it is said that act only applies to persons resisting process, and that though this mode of proceeding is very proper to remove obstructions to the execution of process, or to any contumelious treatment of it, or to any contempt of the authority of the Court, yet that papers reflecting merely on the qualities of the judges themselves are not the proper objects of an attachment." Lord Chief Justice *Wilmot* goes on to express his dissent from this doctrine, and adds, "when the nature of the offence of libelling judges for what they do in their judicial capacity, either in Court or out of Court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatever."

The petition has been presented in this case by parties to the proceedings out of which the contempt arose,

(a) *Wilmot's Opinions*, 243.(b) *Ibid.* 253.

in consequence of what was said by Lord *Cottenham* in Mr. *Lechmere Charlton's* case. His Lordship then, before taking any measures of himself in the matter, sent to the parties copies of the letters which constituted the contempt, in order that those parties might institute proceedings (a), if they thought proper, and it was only on their declining to do so, that the Court itself took steps to punish the contempt. Here the parties thought that they ought not to shrink from bringing the matter before the Court, being themselves personally attacked.

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Mr. *Bagshawe*, Mr. *Rolt*, and Mr. *Bovill*, for the respondent Mr. *Van Sandau*. In the first place this petition is improperly intituled "*In the matter of Martin*." It has nothing to do with the bankruptcy, but relates solely to the personal conduct of the respondent. It should have been intituled "*In the matter of Andrew Van Sandau*," and, as in proceedings for contempt it is necessary that every step should be regular, this alone is fatal to the petition. But, in the next place, granting that a contempt has been committed, if it were unexplained, still the respondent has given by his affidavit such an explanation as amounts to a sufficient apology. He has sworn, and it is uncontradicted, and must be assumed to be true, that if any of the expressions used in the pamphlet may be construed in a sense disrespectful to the Court, they were not employed, nor did the mind of the writer go along with them, in that sense. There is no instance of a party being punished for contempt after withdrawing the expression which was supposed to constitute the contempt. Mr. *Lechmere Charlton* (a) was liberated on making a less satisfactory apology than is contained in the affidavit now before the

(a) 2 Myl. & Cr. 358, 860.

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Court. Besides, if the contempt had existed, and were not effectually purged by this affidavit, still it is only competent for the Court itself to take notice of it, and if the Court do not think it fit to be noticed, it is not for third parties to interfere, and to make an alleged contempt of Court, which is not a contempt of process, and is not alleged as affecting the proceedings, but only the dignity of the Court itself, a means of gratifying their private vindictive feelings. There are, however, strong grounds for maintaining that no contempt has been committed. No case or authority which could be followed in these days has settled that any disrespect towards a Court, by which its decision could not be affected, or by which justice is not impeded, is a contempt for which the Court would commit. Suppose a judge had been guilty of misconduct, could not a person state and complain of it when the cause is over, without being liable to be committed for contempt? On the contrary, we submit that when the judgment is pronounced, so that it cannot be affected by any observations respecting the matter in dispute, a party has a right to comment upon the decision of the judge, to the extent of imputing to him personal corruption. The comment must be an obstruction to the course of justice, or it is no contempt, so as to furnish ground for committal, whatever grounds it might furnish for proceedings of a regular and ordinary character, if it be false and unjustifiable. The power of committing arbitrarily for contempt, without assigning any reason, is one, which the spirit of the laws of England will not permit to be extended beyond what the necessity of the case requires; it can only exist during the exercise of the judicial functions in each particular case. No decision which has been cited carries the jurisdiction to any greater extent than this. The

passages cited from *Viner* and *Wyatt's Practical Register*, if they ever were law, are not law now. Later authorities are all one way. In *Ex parte Jones* (a), which has been referred to on the other side, proceedings were still pending, and the judgment is expressly founded on the obstruction offered to the course of justice by the publication there. In *The King v. Clement* (b), where a fine had been imposed upon the defendant for publishing the trial of *Thistlewood* during its progress, the Court proceeded entirely on the fact, that the act had been committed pending the proceedings, and was an obstruction to justice, and did not attempt to put the jurisdiction on any higher ground. *Roach v. Garvan* (c) must be misreported, for the propositions there ascribed to Lord *Hardwicke* were altogether irrelevant and unnecessary as regarded the case before the Court, and it is clear that no principles so subversive of freedom are law in this country. The existing law as to contempts was much discussed in the recent case of *Rex v. Faulkner* (d), where although the decision ultimately was founded on the want of jurisdiction of a Commissioner of bankruptcy to commit for contempt, yet the *dicta* of the judges are very applicable to the present case. Lord *Abinger* said, with reference to the letter, which had been sent to the Commissioner in that case, "I can only say that if I received such a letter, I should not consider myself at liberty to commit him;" and Mr. Baron *Alderson* said "There would be a great many committals if such a course were pursued by the judges." Lord *Abinger* added, "Do you mean to say that one of the judges has the power to fine a man for sending him a silly letter, or an impudent letter about

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(a) 13 Ves. 237.

(b) 4 B. & Ald. 218.

(c) 2 Atk.

(d) 2 Mont. & Agr. 311.

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any matter which he has decided? I can only say, I should be very much afraid of exercising it." Yet the question, so put by Lord *Abinger* as being clear, is, in substance, that on which your Honour has now to decide. In the most recent case which has been referred to, that of *Mr. Lechmere Charlton*, Lord *Cottenham* says (a), "The power of committal is given to Courts of justice, for the purpose of securing the better and more secure administration of justice. Every writing, letter or publication which has for its object to divert the course of justice is a contempt of the Court. It is for that reason that publications of proceedings which have already taken place, when made with a view of influencing the ultimate result of the cause, have been deemed contempts," and after going through the authorities Lord *Cottenham* thus summed them up, "All these authorities tend to the same point, they show that it is immaterial what measures are adopted, if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course." The only authority which has been produced in opposition to these principles, is that of Chief Justice *Wilmot*; but it must be borne in mind, that what has been cited was never pronounced as a judgment, and cannot be placed in the scale against those principles, upon which judges who have had the responsibility of giving a decision, which was to be acted upon, have uniformly thought it proper and safe to found their jurisdiction. It is remarkable that during the long period for which Lord *Eldon* held the seals, he never once exercised this jurisdiction, though he doubtless might have often done so, if a production like that before the Court had been considered sufficient to call it into action. In *Ex parte*

(a) 2 Myl. & Cr. 339. See also p. 353.

Wilton (a), which was an application in respect of an assault committed on the steps of the Master's office, Mr. Justice *Coleridge* said, "I rely upon no distinction between the steps of the office, and the interior of the office, or the actual presence of the Master himself. The business however before the Master had been concluded, and he himself makes no application to the Court. I think therefore, if, at the prayer of the party injured, I were now to interfere summarily as for a contempt, I should proceed beyond any well considered and sustainable case in our books. I use these qualifications advisedly, for several may be found in the Digests and Abridgements, upon which no Court would now, I think be willing to act." It is not however necessary to put the case so high as the authorities would warrant us in doing, for what is contained in the paper, although it might have been more carefully worded, is substantially nothing but fair criticism. An act of parliament has been even by judges called a strange jumble, or an instrument of fraud, but such expressions have never been looked upon as a contempt of parliament, nor as intimating that the intention of parliament was to encourage fraud. And criticisms of a similar nature have often been made as to the effect of particular decisions of Courts, without any contempt being supposed to be committed by the counsel who made such observations. At all events *Ex parte Wilton (a)* must be considered as deciding that it is competent for the Court alone, upon which the animadversion is made, to vindicate itself, and that the parties themselves cannot interfere. It appears that a copy of this paper was sent to the Lord Chancellor, and no doubt his Lordship would have interposed,

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(a) 1 Dowl. P. C. N. S. 806.

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as Lord *Cottenham* did in Mr. *Lechmere Charlton's* case, if the paper had been considered as amounting to a contempt. [Sir *George Rose*. Had the Lord Chancellor any jurisdiction in the case?]

Mr. *Thesiger*, in reply, was stopped by the Court.

Sir G. ROSE.—This petition, which is very properly presented in the matter of *Martin*, calls upon the Court to direct that Mr. *Van Sandau* shall pay the costs, charges and expenses of the application, and that he shall be committed for contempt of Court, and struck off the rolls of the Court of which he is a solicitor. As to that last part of the application, I immediately yielded to the objection, that it was an application to which I could not possibly accede, being of opinion, that nothing that was put forward in this petition in any manner impeached the respectability or conduct of Mr. *Van Sandau*, or his ability to continue as a solicitor, and that he might fairly, without reference to anything upon which the Court is called upon to discharge its duty this day, be left in the exercise of his professional duties. Addressing myself, therefore, to the other part of the petition, it appears to me, that that part which asks that Mr. *Van Sandau* shall pay the costs, charges and expenses of this application, is a matter of course, always attaching to those matters of contempt when the Court is satisfied that the Order ought to be carried to that extent. And in this instance Mr. *Van Sandau* would be the less entitled to complain that the petitioners have carried their petition to that extent, inasmuch as it formed part of his application and motion against them, that they should be fixed with the costs, charges and ex-

penses. So far, therefore, as regards that part of the petition, I apprehend the petitioners are entitled to take the Order.

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As to the other part, on which I am called upon to exercise, for the first time, a jurisdiction in the case of contempt, I shall say a very few words in answer to the argument as to want of jurisdiction of this Court in that respect thrown out by the bar. It is impossible, in my mind, to question that such a jurisdiction is inherent in this Court, as a Court of record, without which its constitution as a Court of record would be altogether useless. Nor is it necessary to resort to the language of the act of parliament, by which, in express terms, all the incidents, privileges and rights of a Court of record are given to this Court, and which only gives, by explanation and description, that which was essentially inherent in the Court when it was constituted a Court of record. I will go further and say, that if the Court had not been constituted a Court of record, or if the language of the act of parliament, to which I have referred, as giving all the rights, incidents and privileges of a Court of record, had not been found in that act of parliament, still when, by the statute, all the jurisdiction belonging to the Lord Chancellor in bankruptcy was with equal authority transferred to this Court—when the whole pre-eminence and superintendence in bankruptcy was transferred to this Court by the statute, with all the rights which the Chancellor exercised, there could be no doubt on the subject. For, upon an application of this nature, it was only necessary to ask what were those rights, or what was the jurisdiction which the Chancellor had been in the habit of exercising, and it would be found, by recurrence to immediate authorities, that the

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jurisdiction had been carried to a latitude, beyond what might be contemplated as in the strict nature of contempt, in applications in bankruptcy. It will be found that Lord *Hardwicke*, setting the example, and Lord *Eldon*, on more occasions than one, following it, held contumacious language or insubordination, even to the warrant of the Commissioner, to be an interference with the course of justice, which the superintending judge was called upon to treat as a contempt of Court.

Having thus stated my opinion as to the jurisdiction of the Court, I would, if it were necessary, go through the long pedigree of cases upon it. But they are exceedingly well collected in the eighth volume of the State Trials, by *Howell*; and I will no further detain you by a reference to authority, than by reading a short extract, which appears to me to be peculiarly applicable to the case with which we are now dealing. I am quoting from *Almon's case*; it is the language of Mr. Justice *Wilmot*, who says, (a)—“ By our constitution, the king is the fountain of every species of justice which is administered in the kingdom. The king is *de jure* to distribute justice to all his subjects; and because he cannot do it himself to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath, and sit in the seat of the king concerning his justice. The arraignment of the justice of the judges is arraigning the king's justice; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the mind of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever man's allegiance to the laws is fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and, in my

(a) *Wilmot's Opinions and Judgments*, 255.

opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever, not for the sake of the judges as private individuals, but because they are the channels by which the king's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open and uninterrupted current, which it has for many ages found all over this kingdom, and which so eminently distinguishes and exalts it above all nations on the earth. In the moral estimation of the functions, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the Court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal, which fancy could suggest, on the judges themselves. It seems to be material to fix the ideas of the words, 'authority and contempt of the Court,' to speak with precision on the question. The trial by jury is one part of that system. The punishing contempts of the Court by attachment is another. We must not confound the mode of proceeding, and try contempts by jury, and murders by attachment; we must give that energy to each, which the constitution prescribes. In many cases, we may not see the correspondence and dependence which one part of the system has and bears to another, but we must pay that deference to the wisdom of many a es, as to presume it; and I am sure it wants no great intuition to see, that trials by juries will be buried in the same grave with the authority of the Courts which are to preside over them."

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With regard to the argument, that this is a mere personal altercation between Messrs. *Turner* and *Hensman*

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and Mr. *Van Sandau*, without intending or considering it right to go into any consideration of the particular circumstances or facts in dispute, I shall dismiss that part of the case with one dry abstract proposition, namely, that looking at the petitioners as persons simply, who, while engaged in litigation in a court of justice, are assailed by charges which call upon them to vindicate themselves, it is no answer to their complaint that they have been so assailed, to say that they ought to meet the charges by proceedings in another Court, where it can be sifted or proved; but it is a contempt of this Court that such persons are so treated, and they are entitled to come into this Court for protection. A distinction has been attempted to be maintained, that in this case the proceeding is not a pending proceeding, but a proceeding that has been concluded: but, even if this case could be so looked at, it is not, in my humble opinion, a right conclusion, that parties are at liberty to attack each other with abuse or libellous statements, as to what has been done in any particular litigation, though that litigation has been brought to a close. And if the principle be the protection of the subject in all fair matter of litigation, in order that his mind may be unbiassed by threat or intimidation, and that he may go on freely through that course of proceeding which the laws of his country have provided for him, I cannot but consider it the duty of the Court to protect him against an impression, that when the proceeding is concluded, he may be liable to imputations and abuse, and have no protection but by going into a Court of law for damages in an action for libel. I apprehend it is the duty of the Court to the suitors, to tell them that, though the matter is ended with respect to them, the Court will still protect them, as if the litigation itself,

or the business of the Court, were still pending; and that the principle is not varied by the circumstance that the matter is altogether concluded. And I am rather fortified in that mode of dealing with the question, because, if the attention of the learned counsel be directed, I think, to that case in *Atkins*, unless I am mistaken, it will be found that the decree was pronounced, and that what took place did not take place until after the Court had dismissed the matter. But am I to be told, that a matter which is still in minutes, and which one of the statements of this paper represents as a chaotic jumble, as incapable of being embodied in an order, is a concluded matter? Is the matter concluded, when the learned judge has merely pronounced the oral decision, and has left it unembodied in the technical form in which it is always put? I have said, that, in my opinion, it would make no difference that this state of things had arisen after the matter had been concluded, the parties being, as I conceive, entitled to the protection of the Court, with reference to what has previously taken place in Court, although it is concluded. But it is unnecessary to go upon that principle, because I take upon myself here to say, if the pendency of the litigation was necessary to enable the Court to treat what was done as a contempt, this litigation was sufficiently open for the Court to found its jurisdiction upon.

Therefore, dismissing what appears to me to apply as between Messrs. *Turner* and *Hensman* and Mr. *Van Sandau*, I must now direct my attention to the printed paper to be taken as a libel, and a scandalous and gross misrepresentation of what has been done by the Chief Judge in this matter; and, after the ample comment which this part of the case has received at the bar, it would be

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unnecessary for me to make any observation as to my view of it, did I not feel, that, in a case where the Court has already been challenged with disposing of a question, without reference to the circumstances upon which the judgment ought to proceed, a duty was imposed upon me personally to explain the view in which it strikes me that this amounts to a gross contempt and libel, not only on the learned judge, but also on the Court. The shape in which the paper which I hold in my hand has been presented, has been very properly called to the attention of the Court. The title of it purports to be, "A Statement of extraordinary Frauds practised in this Bankruptcy, showing how such Frauds are now facilitated and encouraged, and how they might be prevented. By *Andrew Van Sandau*, Attorney-at-Law." If this had merely existed, without any of the circumstances which our attention has been called to, namely, the diligent circulation, by placing it in the hands of every person whose mind was intended to be influenced by its operation—if, as an ordinary publication, it had been left merely to take its chance—that would be one thing; but, considering it as a publication published in this way, with this title, with the name of a gentleman so well known to the profession, and peculiarly conversant with the subject to which his paper has tried to call the attention of the world, could there be any publication more likely to challenge the attention of mercantile and professional men, and the numerous body of persons interested in the administration of bankrupts' affairs? On the outside of the paper there is, I agree, nothing which carries with it any disrespect, or imputation of disrespect, or impropriety in any one. We open it, then, to find out what is meant by the indorsement on the back; there it begins, "A

short Statement of Frauds, by which the Public are robbed under Fiats in Bankruptcy, and by which the Profession of the Law is brought into Disrepute." Unquestionably very strong language, but which points to no individual. We have therefore to put the question, by whom are the frauds committed? by whom is the public robbed? by whom is the profession of the law brought into disrepute? And, in order to answer this question, we have of necessity to carry ourselves all through this paper. But having done so, must not the answer be of necessity, and without any doubt, that the writer means to charge the Chief Judge of the Court of Bankruptcy, in co-operation, if not in conspiracy, with Messrs. *Turner* and *Hensman*, with one of the Taxing Officers of the Court of Queen's Bench possibly—nay, with the Registrar who is to be accessory to the "chaotic jumble" when the Order is to be drawn up? Those are the parties more or less in the conspiracy, for certainly they are all more or less agents in the fraud; those are the persons by whom the public is robbed, by whom the frauds are encouraged, and by whom the improvements in bankruptcy are prevented.

After having thus introduced the matter, the paper goes on to give a short narrative of the case out of which the question arises. It puts it in this way: there being a competition for the choice of assignees under this bankruptcy, and it being found that Mr. *Glaister*, Messrs. *Turner* and *Hensman's* client, was likely to run Mr. *Van Sandau's* client very hard, an arrangement is come to, on the understanding that Mr. *Cumming* is to be associated in a participation of the profits under the fiat with Messrs. *Turner* and *Hensman*, the solicitors of the competing assignee. Now, upon this I take occasion to say, it is

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the first instance which I have met with during my experience in bankruptcy of any such arrangement, and it does strike me that nothing can be open to more inconvenience, nothing can be a greater infliction on the funds in bankruptcy, nothing can be found more to occasion those frauds which it is the object of this writer to prevent, than the continuance of that practice thus brought forward as a prominent part of the subject, than the relation in which I find Mr. *Cumming* and Mr. *Van Sandau*, and Messrs. *Turner* and *Hensman*, standing. And I find the Chief Judge, in the opening of his judgment in the case, takes precisely the same view of, at least, the inconvenience that arises from such an association of solicitors, so confounding the choice of assignees, and so silencing the opposition of other creditors who might carry a different choice of assignees, so preventing what the statute gives, the right of nominating assignees by the creditors, by an arrangement which places in their own hands, by a kind of tenancy in common, a participation in the proceeds of the bankruptcy. And, to say the least of the mischiefs which may arise from such a state of things, I think to that is to be attributed the very inconvenient state of circumstances under which it is my misfortune to have been placed this day. After having stated the circumstances which placed them in this kind of antagonism, thus occupied in the bankruptcy, it being represented there was occasion to suspect that more of the bankrupt's estate than had been proper had gone into the hands of the other solicitors, Messrs. *Turner* and *Hensman*, and after an attempt to review the taxation before the Commissioner, which I should think Mr. *Van Sandau* himself knew as well as anybody could not be reviewed without the authority of the Court, an application is stated to

have been made here by Mr. *Glaister*, to have the bills of costs of Messrs. *Turner* and *Hensman*, and Mr. *Cumming*, taxed, and out of that arises the contest between these gentlemen, upon which in the result the Order complained of took place. [His Honour then went through the facts of the case, and showed the groundlessness of the imputations made against the Chief Judge himself for the manner in which he had dealt with the case.] It comes back to this result, that Mr. *Van Sandau* imputes to Messrs. *Turner* and *Hensman*, that about 240*l.* of property plundered by the connivance of their clerk (of which it is intimated they could not be otherwise than cognizant), had found its way into their pockets. Then, after going through the different taxations which took place in the Court of Queen's Bench and the Court of Bankruptcy, the paper goes on to say, "whilst the honest attorney only charges and gets his dues, the knaves who will speak falsely and rob may get, as in the case under consideration, for alleged disbursements, accounts allowed which have never been paid. Now the writer, in common with every honest attorney, deprecates that practice, and he consequently, in the name of the respectable body of solicitors, sought to induce Sir *Knight Bruce* to correct that practice; but that learned judge professed to believe the unsupported oath of Messrs. *Turner* and *Hensman*, that they were entirely ignorant of their clerk's dishonesty, although it was in effect distinctly sworn, and was uncontradicted, that they had pocketed all the booty obtained by the instrumentality of their clerk." The statement then goes on to remark, that not merely was the writer mulcted in the costs as connected with the litigation, but he was mulcted in the costs by the especial care of Sir *Knight*

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Bruce;—"who took especial care,"—that is, he stepped out of the way, in order "that the costs should not be paid out of the bankrupt's estate." Now, is there any difficulty in arriving at the character which one is to give to this paper, as to the object for which it was written? For, notwithstanding the intent avowed in *Mr. Van Sandau's* affidavit, I must of necessity gather the intent from the instrument itself. And this intent is established in my mind most conclusively by the passage in the paper to which I am now about to call your attention. He says, "Of the judgment it is unnecessary to write further, than that it is an elaborate production." That is, there had been the utmost care and attention given to work out this judgment which was the subject of animadversion. It was an elaborate production, wholly beside the merits of the case, free from all allusions to the facts or statements in the affidavits, which it was but charity to suppose were never referred to by the judge; free from all denunciations against fraud; and that the only object of it seemed to have been, to deter solicitors from every attempt to expose and correct abuses in bankruptcy.

Now the question to be put on this concluding part of the paper is this,—if it be imputed to the judge, that in an elaborate judgment, with all the affidavits, and all the means of judging, he proceeds to judgment, without referring to those affidavits which it is in his power and duty to refer to,—and if his judgment is free from all denunciations against fraud, proceeding from the desire to draw a veil over that fraud and protect that fraud, and likewise to deter the honest solicitor from prosecuting those inquiries, mulcting the honest attorney in the costs who comes forward with a statement of them, and denying him costs out of the estate,—if I am right in stating that such

is the conclusion that is to be drawn from the manner in which this is conveyed—can we for a moment hesitate in arriving at the conclusion, that it was a gross and scandalous contumacy of the learned judge, that it was a gross libel upon him which ought to be visited as a contempt of this Court? It would be no answer, either to the parties who bring this petition, or to the Court itself, that the truth of such charges may be tried or asserted or vindicated by a proceeding at law for a libel.

I was certainly very desirous, and most anxiously hoped, that I should have found something in the respondent's affidavit, or something stated by him even at the very last moment, which would have relieved me from doing what I cannot but feel very great pain that it is my duty to do. But I should very idly attempt to discover any thing leading to such a result in this affidavit, which is put in as an extenuation of Mr. *Van Sandau's* conduct. Not only what is stated in this affidavit, but many of the points which have been put forward in vindication of the course which he has taken, appear to me, to say the least, anything but an extenuation of that which is made the charge against him. If there were anything to induce me to believe, that suspending the Order would give him an opportunity of further considering the matter, would induce him to do that which the Court had a right to expect, I would gladly take that course. But really this explanation which has been put in in this affidavit, which has been called an apology, takes away every expectation that such would be the result.

I therefore find myself obliged to carry the Order to the full extent to which it has been prayed against Mr. *Van Sandau*, with the exception of striking him off the Roll.

Ordered accordingly.

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February 8.

On this day, Mr. *Bagshawe* appeared in support of a petition presented on the 5th of February by Mr. *Van Sandau*, praying that the registrar might be ordered to delay passing the Order made on the 4th of February, or that the execution of the Order might be suspended for ten days. In support of the petition it was stated, that the petitioner wished for an opportunity of consulting some of his friends in the profession, as to the course which, with reference to his professional character, he ought to take under the circumstances.

Mr. *Simon* appeared for the respondents Messrs. *Turner* and *Hensman*.

The COURT ordered the former Order to be drawn up, but that when drawn up it should not be delivered out for ten days, and that the petitioner should at the end of ten days be at liberty to apply to the Court. Costs of this application reserved.

Serjeants' Inn
Hall,
February 17.

Mr. *Van Sandau* having presented a petition on the 14th February, praying that the Order for committal might be discharged, now appeared in person in support of his petition, and expressed his readiness to apologize for any language, which he had used in his publication, which might be considered as disrespectful to the Court; but, as far as the observations therein contained related to Messrs. *Turner* and *Hensman*, he said he could not consent to withdraw or apologize for any of them, but was on the contrary fully prepared to justify them in any manner that might be thought proper. He was willing to make an apology framed upon the precedent of that

upon which Mr. *Lechmere Charlton* was discharged, except that it would not be necessary for him to follow that part of Mr. *Charlton's* apology, in which he said that he regretted having improperly attempted to influence the conduct or judgment of the Master in the matter pending before him. There was nothing in the publication which could be regarded as having for its object to obstruct the course of justice, or to influence the decision of the Court. It was evident from the whole of the paper, that he had considered the decision which had been given as final. If the apology which he thus tendered to the Court were not deemed sufficient, he could go no further; but must submit to the Order being drawn up, and trust for his liberty to the opinion which a Court of law would entertain as to the validity of the Order, on an application for his discharge by *habeas corpus*. In that event, however, he should wish now to submit, that the Order ought to be varied, and ought to show upon the face of it the precise grounds upon which he was committed, in order that the Court of law might be enabled to judge of the sufficiency of those grounds; *Case of the Sheriff of Middlesex (a)*. There was another part of the Order, which ought also to be varied; he meant that part, by which he was ordered to pay the costs, charges and expenses of and incidental to the proceedings. He submitted, that the Court had no jurisdiction, upon a committal for contempt, to order him to pay costs. The Court might fine for contempt, but the fine when imposed would go to the crown, and not to any party to the litigation before the Court. There was no power in the Court to order a party, as a punishment for his contempt, to pay a sum to his adversary. Where such Orders

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(a) 11 Ad. & Ell. 289.

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had been made, they formed part of Orders discharging the party from his contempt, and as part of the terms and conditions upon which he was discharged, and to which he submitted in order to obtain his discharge. Such an Order had never formed part of the Order for committal itself. Besides, not only did the Order direct payment of costs, but of costs, charges and expenses; that was, costs as between solicitor and client, or larger costs still. Under such an Order, the officer would allow every expense which Messrs. *Turner* and *Hensman* had thought proper to incur, including that of retaining three Queen's counsel, in addition to one junior counsel. He submitted, that such an Order was altogether without precedent, and would operate most injuriously and oppressively.

Sir G. ROSE, (without calling on Mr. *Bacon* and Mr. *Simon*, who appeared for Messrs. *Turner* and *Hensman*): It is perhaps unnecessary for me to make any observations upon this case. At the same time, I am desirous that I should not part with it, without a few. When the petition originally came on before me, I went fully into all the circumstances on which it depended, and I added the reasons, on which, it struck me, I was bound to exercise the jurisdiction which I was called upon to exercise. The old authorities upon the subject are very well collected in the 8th volume of the State Trials. I had no doubt in the world, as to the jurisdiction of the Court; and, however painful it was for me to be called upon to exercise it, I should have been guilty of a gross dereliction of my duty, had I hesitated to do so. With regard to the greater part of the argument, which I have heard to day, namely, that the Order was improper, in

directing Mr. *Van Sandau* to pay the costs, charges and expenses of the application, I should be very glad to know, (and I am sure from my own knowledge of Mr. *Van Sandau's* experience, that no one knows better than he), whether it is not an ordinary direction in an Order of the Court, that costs, charges and expenses should be paid, and beyond all doubt, in cases which involved circumstances of misconduct with regard to the Court. It is really a matter of course, to order that costs, charges and expenses should be paid. It would be idle to hold out to parties the protection of the Court against insulting libels, if they are to seek that protection, by being put to one single sixpence of expense. In every mode in which misconduct is brought before the Court, costs, charges and expenses are given to the parties coming for the protection of the Court; costs, charges and expenses therefore, however exaggerated they may be, (which will be seen by the mode in which they are dealt with in taxation), are an ordinary incident to an Order made under such circumstances. It was impossible, looking at the petition, for me to make any other Order than the Order I did make. That being the case, the whole matter was disposed of, as far as it depended on the merits; whether the Order is right or wrong, every thing that could be said on the subject had been disposed of.

I cannot but say, then, that the course this has taken surprises me very much, looking at the petition which we are now meeting to-day to consider.

Mr. *Van Sandau* pledged himself on this petition, that he never contemplated being guilty of contempt of this Court; that he was desirous and anxious, properly and in a becoming manner, to purge himself of such contempt; but that, in order to do so, without detriment

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to his own character, he was anxious to have a short time allowed to him for taking the sense of highly respectable members of the profession to which he belongs, and, with that object, he was anxious to postpone the execution of the Order for his committal for a short time. With that view, and for that purpose only, and upon the faith of that representation, was the Order suspended, that at the expiration of ten days Mr. *Van Sandau* might take that course which he pledged himself to take. Now, I will ask, from what we have heard from Mr. *Van Sandau* this day, has that pledge been to any and what extent redeemed? There could be no difficulty as to the course which was expected from Mr. *Van Sandau*. I take the liberty of repeating that this contempt is a compound contempt, in which the part which relates immediately to the Court itself is perhaps the least. It is not for me to say, whether the learned judge, who has been the subject of Mr. *Van Sandau's* observations, would have found it necessary to vindicate himself by any process of contempt. That learned judge has never stirred in the matter at all. But when parties are insulted, as the petitioners in this case have been, and when, upon the whole of the circumstances being brought before the Court, the Court finds itself involved in the same contemptuous language, it is not to vindicate its own particular insult that this process is now put in force, but because the parties before the Court are under its protection, and because it is a contempt of the Court to direct insulting language against them during the proceedings. I beg Mr. *Van Sandau*, in order that my opinion may be of any use to him, to consider that he will have the least difficulty in dealing with that part of his case, which relates to anything like

resentment on the part of the Court, if I may make use of that expression. By saying he will prove the truth of his assertions with reference to the petitioners, (which, I will tell him, is an aggravation of the contempt,) he cannot escape from the consequences of what he has done. He must put himself right in the face of the public, and of this Court, and of the petitioners.

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Mr. *Van Sandau*. I now beg leave to say, that if my imprisonment is to be perpetual, I never will.

Sir G. ROSE.—I am sorry to hear you say so. It now only remains to dispose of the petition in the paper, and of that one of which the costs have been reserved. Mr. *Van Sandau* must pay the costs of that application. The present application must be dismissed with costs; and the Order, which suspends the execution until ten days have expired, must take its operation from the expiration of those ten days. I have only one word to say with regard to the *habeas corpus*. If there is such a course open to you, I have not the least doubt that the Court to which you apply will do its duty, as I have done mine; and if, in the result, they consider it their duty to undo what I have done here, I can tell you, that no person out of your immediate connexions will be more ready to congratulate you than I shall.

The ORDER as to the costs reserved on the petition of February 5th was, that those costs should be paid by Mr. *Van Sandau*; and the Order upon the petition of the 14th of February was, for the dismissal of that petition with costs.

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Master's Office,
Southampton
Buildings,
before
Sir G. Rose,
February 21.

Mr. *Van Sandau*, having been taken into custody under this Order, presented another petition on the 19th of February, which came on to be heard on the 21st. The petitioner, by his affidavit stated, that he regretted and was sorry that he wrote printed and published the printed paper, or that he had so acted as to be guilty of a contempt of the Court, and that he was anxious to purge himself of the contempt of which he had been declared to be guilty, by apologizing, and he thereby humbly apologized to the Court for the same. The petitioner prayed that his apology might be accepted, and that he might be purged from the contempt of which he had been declared to have been guilty, and might forthwith be discharged out of custody.

Mr. *Bagshawe*, for the petition.

Mr. *Bacon*, and Mr. *Simon* for Messrs. *Turner* and *Hensman*.

The ORDER was, that, upon Mr. *Van Sandau* depositing 200*l.* in the hands of Mr. *Ayrton*, the registrar, on account of the costs charges and expenses already ordered to be paid by Mr. *Van Sandau* to Messrs. *Turner* and *Hensman*, and the costs of and occasioned by the present application, and on his undertaking to pay such costs charges and expenses, and to proceed to the taxation thereof forthwith, he should be forthwith discharged out of custody. The sum was accordingly deposited, and Mr. *Van Sandau* was discharged.

Ex parte HARDMAN and others.—In the matter of
THOMAS MOLYNEUX.

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Lincoln's Inn,
Feb. 12 & 26.

THE bankrupt had acted as trustee under three different wills, under which he had also beneficial interests in reversion. At his bankruptcy he was indebted to the trust estates in respect of trust monies received by him, and not invested according to the trusts. A new trustee had been appointed in his stead as to one of the trust estates, under a power in the will, but no new trustee had been appointed with respect to either of the other two trust estates. The greater part of the *cestuis que trustent* were interested under all three of the wills; and this was the petition of the persons entitled for life under the trusts of the wills, and of some of those entitled in reversion, for the appointment of new trustees, and for the sale of the bankrupt's beneficial interests under the wills, and the application of the proceeds towards making good the sums due from him to the trust estates, and for liberty to prove for what should remain unpaid after the proceeds had been so applied.

The first will was that of one *James Hardman*, dated March 3d 1821, whereby the testator's real and residuary personal estate were devised and bequeathed to one *Thomas Hardman* and one *Thomas Entwistle*, their heirs, executors, administrators and assigns, upon trust to sell and to invest the proceeds of the sale, and pay the income to the testator's wife for life, and then to divide the principal monies among the testator's brothers and sisters, and their issue, as his wife should by will ap-

A bankrupt's reversionary interest under the trusts of a will ordered to be sold, and the proceeds applied in making good monies which had come to his hands as trustee under the same trusts, and had been misapplied.

The residence of a party, interested in trust funds, being out of the jurisdiction, does not authorize the Court to appoint new trustees, without notice being given to such party.

A testator bequeathed his residuary estate to two trustees, whom he appointed executors; one of them renounced; and after the death of the other, the trust funds came into the possession of his legal personal representative, who became bankrupt. The *cestuis que trustent* presented a petition for the appointment of a new trustee. On it appear-

ing that the original testator had been dead for twenty years, and that the interest of the trust fund had ever since been applied according to the trusts, and on the petitioners deposing that to the best of their belief all the original testator's debts, &c. had been paid: *Held*, that a new trustee might be appointed, without it appearing that any personal representative of the original testator was before the Court.

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point. The wife, *Thomas Hardman*, and *Thomas Entwistle*, were appointed executors and executrix. The testator died on the 10th July 1823, and soon afterwards *Thomas Entwistle* renounced and disclaimed.

The second will was that of the testator's wife, dated 17th August 1832, and she thereby, in exercise of the power given by her husband's will, appointed the property comprised in that will, so that it became divisible into many parts of different amounts, of each of which the interest was payable to a tenant for life, with a bequest over of the capital of the share to the children of the tenant for life. Under this appointment, the bankrupt's mother (one of the petitioners) was tenant for life of a share, and the bankrupt was entitled, after his mother's decease, to a share of her share. The testatrix left personal property of her own, which she also disposed of by her will, and she appointed the said *Thomas Hardman* and another person, who died in *Thomas Hardman's* lifetime, her executors. The testatrix died in 1832.

The third will was that of the above-mentioned *Thomas Hardman*, who bequeathed his real and residuary personal estate to the bankrupt and one *John Lomas*, their heirs, executors and administrators, upon certain trusts, for the petitioners, during their lives, with bequests over in favour of their children, and a share in one of those reversionary interests belonged to the bankrupt, who, with *John Lomas*, was appointed executor.

Thomas Hardman died in 1838, and *Lomas* renounced.

The fiat issued on the 2d of August 1843. In 1844, two of the petitioners were, under a power contained in the will of *Thomas Hardman*, appointed new trustees of that will, in lieu of the bankrupt and *John Lomas*, but

the other wills contained no power to appoint new trustees.

The petition stated, that, some time previously to *Thomas Hardman's* death, all the debts funeral and testamentary expenses of *James Hardman* and *Ann Hardman* were fully paid, and all the legacies bequeathed by the three wills were also fully paid, except that the shares of the trust monies, to which, by virtue of *James Hardman's* will, and the appointment made under it, and by virtue of the bequests contained in *Ann Hardman's* will, the petitioners were entitled, had not been distributed.

The dividends arising from the trust funds had been paid according to the trusts, and upon the death of *Thomas Hardman* the capital of the funds came into the hands of the bankrupt, as *Thomas Hardman's* executor. The bankrupt had invested part of the trust monies in his own name as trustee, but had retained the rest in his hands, paying interest upon the amount so retained to the *cestuis que trustent*, according to the wills.

One of the *cestuis que trustent* was residing in New South Wales, and it did not appear that he had any notice of the application, but all the other *cestuis que trustent* under the wills were before the Court.

Mr. *Little*, for the petitioners, cited *Ex parte Gonne*(a).

Mr. *Freeling*, Mr. *Milne*, and Mr. *Palmer*, for the other *cestuis que trustent*.

Mr. *Elmsley*, for the assignees.

The CHIEF JUDGE held, that no Order could be made,

(a) 3 M. & A. 166; 2 Dea. 278.

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as to the estate in which the absent *cestui que trust* was interested, the Court having only jurisdiction to appoint new trustees, upon due notice given to all persons interested in the fund (a).

A question was also raised respecting *James Hardman's* will, there being no evidence that the renouncing executor died in the lifetime of the executor who had proved, and it being therefore doubtful whether the chain of representation was not broken, and whether, if the legal personal representative were any other person than the bankrupt, he would not be a "person interested," within the meaning of the 79th section, who had not been duly served with notice. It was also questioned, whether the funds could be ordered to be transferred to a new trustee, who was not also executor of the original testator, without there being some person before the Court authorized to declare that the debts were all paid (b).

The Court, however, having regard to the length of time which had elapsed since *James Hardman's* death, and on hearing that the affidavit of the petitioners stated that all his debts were paid, and that the fund was a clear fund, of which the income had for many years been paid according to the trusts, made the Order as to the estates in which the absent *cestui que trust* was not interested.

February 26.

On this day Mr. *Palmer* stated, that he was authorized to appear and consent on behalf of the absent *cestui que trust*, whereupon the Order was made as to both wills. The Order was in the following form:

(a) 6 Geo. 4. c. 16. s. 79.

(b) See *Ex parte Wilkinson*, 3 M. & A. 145; 2 Dea. 151.

"Now on hearing, on Monday the 12th of February, and this day, what was said by," &c., "and Mr. *Milne*, of counsel for," &c., "appearing and consenting thereto, and stating that all the debts, funeral and testamentary expenses of the said testator, *James Hardman*, and of the said testatrix, *Ann Hardman*, were paid, and the testamentary fund a clear fund; and by Mr. *Palmer*, of counsel for," &c., "and *John Hardman Lister (a)*, in the said petition mentioned:—It is ordered," &c. The Order directed the removal of the bankrupt from being trustee under the wills of *James Hardman* and *Ann Hardman*, and the appointment of two of the petitioners as new trustees, and directed the concurrence of the bankrupt in proper acts for transferring the trust funds. And it was referred to the Commissioner to take separate accounts of the several sums due from the bankrupt, in respect of the several deficiencies in the trust funds caused by the defaults of the bankrupt. And all the interests which the bankrupt took, or was entitled to, under the respective wills, were ordered to be sold, and the proceeds applied, after payment of expenses, in payment of the several deficiencies in the trust funds, with liberty for the new trustees to prove for so much of the deficiencies as should not be so made good. And the Order was to be without prejudice to such rights (if any) as the personal representative of *James Hardman* might have, if the bankrupt were not such personal representative.

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(a) This was the absent cestui que trust.

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Ex parte The Rev. THOMAS WHIPHAM and others.—In the matter of AYSHFORD WISE, NICHOLAS BAKER, and WILLIAM SEARLE BENTALL.—

Lincoln's Inn,
February 15.


Country bankers, appointed by a friendly society to receive monies, and to transmit them to their London agents, for the purpose of investment in the Bank of England to the account of the commissioners for the reduction of the national debt, are not to be considered as appointed to an office in the society, within the meaning of the Friendly Society Act, 4 & 5 Will. 4. c. 40. s. 12.

THIS was the petition of three trustees of a friendly society, called "The Newton Abbott and Newton Bushel Men's Annuitant Society," praying that the assignees might be ordered to pay them the sum of 126*l.*, under the provisions of the Friendly Society Act.

The petition stated, that the society was established in the year 1820, according to the provisions of the statute then in force concerning friendly societies; and that the rules of the society had been duly certified and enrolled, pursuant to the directions of the 10 *Geo.* 4. c. 56., and the 4 & 5 *Will.* 4. c. 40., and that the petitioners had been duly appointed trustees of the society, in whom all the real and personal property of the society was vested as such trustees, under the fourteenth of the rules of the society, so certified and enrolled according to the provisions of the acts of parliament.

That in the year 1829 it was resolved by the society, that all the monies and effects of the society should be invested in the Bank of England, to the account of the commissioners for the reduction of the national debt; and that, in order to carry such resolution into effect, it became necessary, according to the rules of the commissioners, whose business is transacted and carried on in London, that some agent should be appointed in London on behalf of the society, for the purpose of completing such investment. That in June 1829, upon application being made to the bankrupts by the secretary of the society, the bankrupts undertook the employment and

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office of agents of the society, to receive such monies of the society as they were desirous of investing to the account of the commissioners, and to transmit the same to Messrs. *Williams, Deacon & Co.*, of London, bankers, who were the London agents of the bankrupts, in order that *Williams & Co.* might complete such investment at the National Debt Office in London, upon the terms that the bankrupts should be paid by the society their charges for commission and postages in respect of the sums so to be received and transmitted by them. That thereupon, at a quarterly meeting of the society duly held on the 29th June 1829, it was resolved that Messrs. *Williams, Deacon & Co.* should be agents for conducting the business of the society with the Bank of England, as required by the National Debt Office, and that the bankrupts should be the medium through which the monies were to be transmitted to those London agents for that purpose. That this resolution was duly communicated to the bankrupts by the secretary of the society immediately after the meeting was held; and that various sums of money were from time to time, from the year 1829 to the year 1841, paid by the treasurer of the society to the bankrupts, and transmitted by them to *Williams, Deacon & Co.*, for the purpose of investing the same in manner above-mentioned. And that the receipt of all these sums of money, and all payments with the charges relating thereto, and the commission charged by the bankrupts for the same, and also for the transmission to and from London of the declarations of the trustees for the purpose of the respective investments, and of the receipts from the commissioners for the reduction of the national debt for the sums paid to them, were duly entered in an account between the

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trustees of the society and the bankrupts; and the receipts of the commissioners were from time to time forwarded to the bankrupts, and by them handed over to the treasurer of the society. That the account consisted wholly, from its commencement to its close, on the credit side, of entries of the sums paid by the treasurer to the bankrupts from time to time to be transmitted to *Williams, Deacon & Co.* for such investment, and of payments made from time to time by the treasurer to the bankrupts for their charges postages and commission on payment of such sums; and consisted wholly, on its debit side, of the sums transmitted by the bankrupts to *Williams, Deacon & Co.* to be invested by them in manner aforesaid, and of the charges of the bankrupts for postages and commission on payment of the respective sums of money received by them of the treasurer to *Williams, Deacon & Co.*

On the 29th June 1841 the treasurer of the society paid into the banking-house of the bankrupts the sum of 126*l.*, for the purpose of having the same invested in the manner before mentioned, at the same time giving to the bankrupts a declaration in writing, signed by two of the trustees of the society, directing the payment of this sum into the Bank of England, to the account of the commissioners for the reduction of the national debt. The bankrupts alleged, that they transmitted this declaration to *Williams, Deacon & Co.*, with instructions to procure the investment of the money in the Bank of England to the account of the commissioners; but, in fact, no such investment was ever made; it being alleged by *Williams, Deacon & Co.*, that the bankrupts were largely indebted to them, and that, no sum of money having been specifically remitted to

them for the purposes of such investment, the above declaration was never acted on. When, however, the above declaration was so transmitted, *Williams, Deacon & Co.* held in their hands various securities to an amount and value far beyond the debt then due to them from the bankrupts. These securities had been deposited with them by the bankrupts for the purpose of securing the balance of their said debt, and were held by *Williams, Deacon & Co.* in the character of mortgagees. The accounts between *Williams & Co.* and the bankrupts were adjusted after the issuing of the fiat, and the whole debt due to them from the bankrupts had been satisfied, partly by realization of some of the securities, and partly by the payment by the assignees of the remaining balance in the month of December 1841; and such of the securities in the hands of *Williams, Deacon & Co.* at the date of the fiat, as remained unrealized when their debt was satisfied, were handed over or accounted for by them to the assignees, who had thus realised a much larger amount than the sum paid by them to *Williams, Deacon & Co.* in satisfaction of their debt, and the said sum of 126l.

On the 20th July 1841 the fiat issued.

Reference was then made by the petitioners to the 4 & 5 Will. 4. c. 40. s. 12., by which it is enacted, "That if any person already appointed, or who might thereafter be appointed, to any office in a society established under that, or the previous act of 10 Geo. 4. c. 56., and being entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any monies or effects belonging to such society, or any deeds or securities relating to the same, shall die, or become a bankrupt or insolvent, or

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have any execution or attachment or other process issued, or action or diligence raised, against his lands, goods, chattels, or effects, or property or estates heritable or moveable, or make any assignment, disposition, assignation, or other conveyance thereof for the benefit of his creditors, his heirs, executors, administrators or assigns, or other persons having legal right, or the sheriff or other officer executing such process, or the party issuing such action or diligence, shall, within forty days after demand made in writing by the order of any such society, or committee thereof, or the major part of them, assembled at any meeting thereof, deliver and pay over all monies and other things belonging to such society to such person as such society or committee shall appoint, and shall pay out of the estate, assets, or effects heritable or moveable of such person all sums of money remaining due, which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied."

The petition alleged, that under the circumstances above mentioned, and by virtue of such their office or employment, the bankrupts, at the date of the fiat, had in their hands the sum of 126*l.* belonging to the said society, for which no proof had been made under the fiat; and that on the 6th July 1843 a demand for this sum on behalf of that society was duly served upon the assignees.

A dividend of 5*s.* in the pound had been declared; and it appeared that there were still funds of the joint estate more than sufficient to pay the sum of 126*l.*

The petitioners contended, that the sum of 126*l.* was, at the date and suing forth of the fiat, in the hands of the bankrupts, by virtue of their employment and office, and

that the petitioners were entitled to receive the same out of the bankrupt's estate, before any further dividend should be made.

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Mr. *J. Russell*, and Mr. *Cholmley*, in support of the petition, referred to the enactment of the Friendly Society Act (4 & 5 Will. 4. c. 40. s. 12.) as stated in the petition (a), and also to the 59 Geo. 3. c. 128. s. 11., by which it is declared, that any such society may pay directly into the Bank of England any sum of money, not being less than 50*l.*, to the account of the commissioners for the reduction of the national debt, upon the declaration of the trustees of such society, or any two or more of them, that such monies belong exclusively to the society. The bankrupts were employed directly by the society for making this investment; but, as they lived remote from the Bank of England, the society appointed the London bankers, *Williams, Deacon & Co.*, to be the agents for conducting the business of the society with the Bank of England. The money, therefore, came into the hands of the bankrupts, by virtue of their employment by the society, within the meaning of the act of parliament. [The *Chief Judge*. The statute says, not persons appointed by the society, but any person appointed to any office in the society. From this it would seem, that the person employed must form part of the establishment.] We submit, that the word "*in*" means *in the matters or concerns* of the establishment. It is not necessary that the party employed should be employed in the locality of the society, or that his employment should be confined to the rooms of the society.

(a) *Ante*, p. 567.

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Ex parte
Whitman
 and others.

The bankers in this case may be considered as officers appointed for the purposes of the institution. There was no dealing here as between banker and customer; but *Wise & Co.* were the agents merely to transmit the money of the society for investment in the Bank of England, and to hand over the receipts of the money invested to the trustees of the society. The employment of the bankrupts was one merely of transmission, and not in the ordinary way of bankers. And there was an actual appointment of the bankrupts within the meaning of the statute; for, at a quarterly meeting of the society, it was resolved, that the bankrupts should be the agents for transmitting the monies of the society to the London bankers.

Mr. Anderdon, and *Mr. Bacon*, *contra*, were stopped by the Court.

V. C. KNIGHT BRUCE, C. J.—This is an enactment creating a privilege against common right, and therefore care should be taken not to enlarge the construction of it. The argument in this case has turned on the meaning of the word “employment” in the statute; but, if that word was to mean anything distinct from the word “office,” which is the material word in the statute, it is strange that the word “employment” should not have been associated with the word “office” in the preceding part of the section; but there the word “office” only occurs. I cannot consider the word “employment” as enlarging the meaning of the word “office.” The question is, whether these bankers had any monies of the society in their hands “by virtue of their office or employment.” I apprehend it is quite

immaterial, whether they were employed in the ordinary way of bankers, or not; the material point being, whether they were appointed to any office in the society. It appears that the bankrupts were appointed to be the agents of the society, in receiving and transmitting monies to London, for the purpose of investment in the Bank of England to the account of the commissioners for the reduction of the national debt, and that Messrs. *Williams, Deacon & Co.* were the agents of the bankrupts for the same purpose in London. Any man, no doubt, may in a sense be said to be discharging the duties of an *office*, when he performs the duties attached to any particular employment; but a person, who is acting as a mere agent for another, is not, in the ordinary sense of the term, understood to be appointed to an *office*. Although there are some senses in which the term "*office*" may be used as synonymous with "employment," yet, in the construction of this act of parliament, I think the word must be taken in the ordinary sense and meaning of mankind. A butcher, or baker, is employed by a customer, but neither of them holds an office to which the customer has appointed him. I am of opinion that the appointment of the bankrupts, as agents for this society, was not an appointment to an office or employment, within the meaning of the act of parliament. I shall give no costs on either side.

Petition dismissed, without costs.

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WHIGHAM
and others.



1844.

*Lincoln's Inn,
February 19.*

A petitioner, seeking to annul the fiat for legal invalidity not patent upon the proceedings, must apply before the certificate is allowed, or soon afterwards; or must account satisfactorily for his delay.

Ex parte GREGORY, FAULKNER, and FOLLETT.—In the matter of CRESSWELL and THOMPSON.

THIS was the petition of a firm, who were creditors of the bankrupt, to annul the fiat, for want of trading. The bankrupt had obtained his certificate, which was confirmed on the 23rd of May 1843. The trading relied upon was that of a scrivener; and, in opposition to the petition, several affidavits were filed, both as to the bankrupts trading generally as scriveners, and as to particular instances of trading. With regard to the latter, however, it was objected, on the part of the petitioners, that they did not amount to more than negotiations of single loans, instead of being general lodgments of money for investment. The affidavits also stated, that the petitioners, in February 1843, were applied to, to consent to annul the fiat, upon a composition of 10s. in the pound being paid to all the creditors, many of whom had agreed to accept that composition. The petitioners, upon that occasion, declined accepting less than 20s. in the pound, one of them stating, that the fiat could not stand, as the bankrupts were not traders, and that, if it were prosecuted, he would upset it.

The petition was presented on the 22d of January, 1844.

Mr. *Swanston*, in support of the petition.

V. C. KNIGHT BRUCE, C. J., without calling on the counsel for the respondents.—In this case there is no allegation or proof of fraud, or equitable invalidity in the fiat. The petitioning creditor's debt and the act of bankruptcy are not disputed, and the petition raises the single question of legal invalidity on the ground that there was no trading. Now, in the first place, looking

at the evidence upon which the Commissioner found the trading, and supposing that evidence to be uncontradicted, I am disposed to think that the just inference to be drawn by a jury from it would be in favour of the trading. But, in *Ex parte Levi* (a), Sir John Leach held, that, unless it appeared upon the face of the proceedings that the party declared a bankrupt is not a trader, a petitioner could not, after the certificate had been allowed, go into evidence to disprove the trading, unless he could show that the commission was fraudulent. And I think it but just, that the application to annul, on the ground of legal invalidity, should be made before the certificate is allowed, or at all events very soon afterwards, unless some good reason is given for the delay. Here the certificate was allowed in April 1843, and was confirmed in May 1843; and this petition to annul is presented on the 22nd of January 1844, without any reason for the delay being assigned, the petitioners being all the time aware of the existence of the fiat. Under these circumstances, the petition must be dismissed with costs.

1844.
Ex parte
GASCOY.

Ordered accordingly.

(a) Buck, 75.

Ex parte LLEWELLEN.—In the matter of *TOULSON*.

Lincoln's Inn,
Feb. 26 and 28.

IN this case a separate fiat had issued against the bankrupt, and afterwards a joint fiat issued against him and his partner; and this was a petition to annul the separate fiat.

The bankrupt's right to his allowance cannot be prejudiced by an Order to annul a separate fiat in favour of a

joint fiat; and therefore the words, "without prejudice to the bankrupt's allowance," will not be introduced into such an Order.

1844.

Ex parte
LLEWELLEN.

Mr. *Rogers* in support of the petition.

Mr. *Bacon* appeared to consent on the part of the assignees under the separate fiat.

Mr. *Simon* for the bankrupt asked that the Order might be expressed to be, without prejudice to the bankrupt's allowance. The bankrupt had obtained his certificate, and, as the separate estate had paid the requisite dividend, he would be entitled to an allowance. By the Order to annul, the allowance would be postponed until the joint estate was wound up, and would depend on the assets realized under the joint fiat. It was only just, therefore, when the separate fiat had been allowed to proceed so far, that the bankrupt should not be deprived of the benefit of it.

The CHIEF JUDGE.—If such a qualification of the Order be proper here, it ought to be introduced into every Order to annul a separate in favour of a joint fiat; and yet I never before heard it insisted upon.

Mr. *Bacon*. The application to annul is usually made so soon after the issuing of the separate fiat, that the question cannot arise.

February 28.

The case, having stood over for the authorities to be looked into, came on again on this day.

Mr. *Rogers*. The words proposed to be introduced are unnecessary; for, if the separate fiat remained in existence, and there were no joint fiat, still the bankrupt would not be entitled to any allowance, unless the joint

estate yielded the statutory amount of dividend, as well as the separate estate; and his right is precisely the same under a joint fiat, *Ex parte Powell* (a). In *Ex parte Farlow* (b), Lord Eldon said, "The old course, in the case of a separate commission against one member of a partnership, was, that the joint property could not be administered in the bankruptcy, and therefore the creditors were driven to their bill in equity to ascertain what was to be paid to the separate creditors, and nothing went in the course of distribution as separate estate, but what was distinguished from the joint estate. The Order for keeping separate accounts in bankruptcy has superseded the necessity of a bill; but that is a mere mode of arrangement, which cannot give the bankrupt other privileges than he would have been entitled to, if his joint property had been distributed under the direction of a Court of Equity." And in *Ex parte Holmes* (c), which was an application by the bankrupt under a separate fiat for his allowance, his separate estate having paid 20s. in the pound, Lord Eldon refused to make the Order, declaring his opinion to be, that, to give the bankrupt his allowance in such a case, would be an improper interference with the right which the joint creditors had to the surplus of the separate estate.

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Ex parte
 LLEWELLEN.

Mr. Simon. The cases cited were decided before the 6 Geo. 4. c. 16., the 129th section of which provides for the bankrupt's allowance in case of partnership. And he referred to *Ex parte Minchin* (d), and *Ex parte Gibbs* (e).

(a) 2 Rose, 449; 1 Madd. 68.

(d) Mont. & M'Ar. 141.

(b) 1 Rose, 422.

(e) Mont. 105.

(c) 2 Rose, 95.

1844.

Ex parte
LLEWELLEN.

The COURT however thought that the introduction of the words proposed would be incorrect, and made the Order in the usual form.

Lincoln's Inn,
February 26,
March 4, and
June 24.

Ex parte TURNER and others.—In the matter of GEORGE TAYLOR.

An equitable mortgagee of an estate, of which the bankrupt is legally the owner, may prove, without giving up his security, if the estate, which is subject to the mortgage, be so incumbered, that the bankrupt would have no beneficial interest in it, if the mortgage were removed.

A partnership, consisting of a father and son, is dissolved; the father equitably mortgages an estate of his own to secure a debt due from the son separately, and afterwards dies indebted, jointly with the son, to an amount more than sufficient to exhaust his assets, including the mortgaged estate, even if the mortgage were removed. The estate descends to the son, who becomes bankrupt: *Held*, that the mortgagee might prove, and keep his security.

THIS was the petition of the assignees to have a proof expunged, on the ground that it ought not to have been admitted, except upon the creditor giving up a mortgage security mentioned in the deposition in support of the proof.

The deposition stated, that the bankrupt was indebted to *William Robson*, the deponent, in the sum of 516*l.* 19*s.*, for principal and interest due on a joint and several bond, dated 24th November 1829, entered into by the bankrupt and his father, *Richard Taylor*, the consideration for which was a sum of 850*l.* advanced by the deponent to the bankrupt, at the time of execution of the bond. And the creditor thereby deposed that he had not, nor had any person to his use, had or received any manner of security or satisfaction for the debt, except the bond, and the title deeds and writings relating to a certain tenement or cottage and garden at Moreton in Marsh aforesaid, which were some time in or about the year 1840 deposited with the deponent by the order of the bankrupt's said father, to whom the said tenement or premises then belonged, as a collateral separate security from the bankrupt's father to the deponent,

The estate descends to the son, who becomes bankrupt: *Held*, that the mortgagee might prove, and keep his security.

for payment of all and every sum and sums of money then due and to accrue due upon the said joint and several bond of the said *Richard Taylor* and the bankrupt.

1844.

 Ex parte
 TURNER
 and others.

It appeared that the bankrupt's father had been in partnership with him, and that the partnership had been dissolved, and that afterwards, in March 1843, the father died intestate, whereupon the property comprised in the deposited title-deeds descended to the bankrupt as his heir at law, subject to *Robson's* security. The premises were stated to be not worth the amount due; and previously to the application to prove, application had been made to the assignees to concur with *Robson* in a sale of the property by public auction, and to join in the conveyance to the purchaser.

It was represented, but not clearly made out, that, independently of the creditor's equitable mortgage, no beneficial interest in the mortgaged premises would have come to the bankrupt, the father's assets being insufficient for the payment of his debts, even if the mortgage had not existed. The Commissioner thereupon admitted the proof, without requiring the mortgage to be given up, and from this decision the present petition was an appeal.

Mr. Swanston, and *Mr. Shebbeare*, in support of the petition. If this mortgage were removed, the estate would be the bankrupt's,—subject to the father's debts, it is true, if there be any,—but still the bankrupt's estate, for the purposes of the question now raised; and no such distinction, as is now to be contended for on the other side, has ever been taken. [*The Chief Judge*. Has it ever been decided, that the rule holds, where it cannot

1844.

Ex parte
 TURNER
 and others.

make any difference to the creditors whether the mortgage exists, or not?] Such cases, no doubt, might be found; although, from the point never having been taken, nor having in fact occurred to any one, no cases are reported with reference to it. The only question is, is it the bankrupt's estate?—a question, which here must be answered in the affirmative; for withdraw the charges, and the bankrupt has the property; it has never before been contended, that it must be his, free from incumbrances. They then cited *Ex parte Grove*(a).

The CHIEF JUDGE.—This case may require that the foundation of the rule should be considered. But the *onus* lies upon the respondent to show, that the estate, which *primâ facie* is the bankrupt's, does not, in truth and substance, belong to him.

Mr. Bacon, *contrâ*. Our affidavits go to establish that point. But, even if they be considered as falling short of actual proof of insolvency of the father's estate, still the creditor might prove, without giving up the security; for the only test is this—was the estate, which is the subject of the security, capable of being administered in the bankruptcy, as matters stood at the time of the fiat? In this case it certainly was not; for it would first have had to be administered as the estate of the father, and in payment of his debts, and therefore was not the estate of the bankrupt subject to the creditor's security, as it ought to be, for the purpose of coming within the rule, that a creditor cannot take the whole of a part, and a part of the whole.

(a) 1 Atk. 104.

Mr. *Swanston*, in reply, referred to *Ex parte M' Turk*(a).

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Ex parte
TURNER
and others.

V. C. KNIGHT BRUCE, C. J.—The case appears to stand thus:—the money was lent to the son; and, for securing the debt, the father became surety, and with his son became jointly and severally liable upon a bond; the father also made an equitable mortgage of part of his estate, to secure the same debt; but the debt, as I have said, was, as between the father and the son, exclusively the debt of the son. The father dies. The real estate descends upon the son, who afterwards becomes bankrupt. Exclusively of the question as to other incumbrances, and the general debts of the father, I apprehend the estate has become the estate of the bankrupt, within the meaning of the rule which excludes simultaneous proof and retention of the mortgage. For the circumstance, that the pledge was not made by the bankrupt himself,—and, that the property, when pledged, was not the property of the bankrupt,—does not, I think, make in principle or substance any difference. But it is said, that here, in truth, the bankrupt never had any interest in the property: that the father was so indebted at his death, that all that descended to the son was simply in effect a trust estate, accompanied with no beneficial interest; and that such a case differs from the ordinary one, even where the bankrupt's own estate is mortgaged for three or four times its value; the existence of the mortgage in this case being immaterial, as regards the bankrupt's estate, and the removal of it being capable of conferring no benefit on his creditors. What would be the result of such a state of circum-

(a) 3 M. & A. 31; 2 Dea. 58.

1844.

Ex parte
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stances, if established, I do not say. I am not prepared to say, that the case suggested is now before the Court; but, on the other hand, I am not prepared to say, that if nothing was substantially vested in the bankrupt,—if the father was so much indebted, that whether the mortgage were a charge on the estate or not, was immaterial,—that if such was the state of things at the date of the fiat, the general rule would apply. I desire to give no opinion on the point; not being satisfied that such a state of things is here made out. The presumption is, that the descended estate is beneficial; until that presumption is displaced, I must at all events consider the general rule applicable. The affidavits filed on the part of the respondents fall far short of what is requisite to remove the presumption. On the materials before me, I think there cannot be a simultaneous proof and retention of the security. The proof must be converted into a claim.

Mr. *Bacon*, for the respondents, asked for an inquiry into the state of the father's assets and debts. ■

The CHIEF JUDGE.—If you desire an inquiry, knowing that I have given no opinion on the point raised, I have no objection to direct such an inquiry; but, at present, I say no more than that I think the point one of difficulty, as well as of novelty, and one which I cannot decide on the materials before me. The Order then will be, to expunge the proof, and to enter a claim for the amount, without prejudice to any question. The claim must be, as of the date of the proof. Refer it to the Commissioner, to inquire what assets of the father are in the possession or power of the assignees, or are affected by the fiat, and

what was the state and amount of the claims thereon immediately before the date of the fiat; and whether, at the time the fiat issued, the bankrupt had any and what beneficial interest in the mortgaged estate, having regard to the claims on his father's assets; and whether the assignees, in respect of the estate to be administered under the fiat, are interested in the question, whether the alleged equitable mortgage is, or is not, a charge on the estate alleged to have been mortgaged; with liberty to state special circumstances. The inquiry to be taken, as at the request of the respondents, and without prejudice to what ought to be done ultimately as to proof.

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It was afterwards arranged, that, instead of the proof being expunged, the dividend should be stayed, and that the respondents were not to interfere as to the certificate, or otherwise.

The case came on to be heard this day on further directions, the Commissioner having made his report.

June 24.

By the report, it appeared that there were debts due from the father and son as partners more than sufficient to exhaust the father's assets, including the mortgaged estate, even supposing the mortgage were removed; but the report did not find the amount of all the debts, nor whether there were any separate debts of the father. The Commissioner found, that, at the time the fiat issued, the bankrupt had no beneficial interest in the mortgaged estate, having regard to the claims on his father's assets; and that the assignees, in respect of the estate to be administered under the fiat, were not interested in the question, whether the alleged equitable mortgage was, or was not, a charge on the estate alleged to have been mortgaged.

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Mr. *Swanston*, and Mr. *Shebbeare*, in support of the petition. Assuming the Commissioner's finding to be correct, still the circumstance, that the estate is subject to charges sufficient to exhaust it, has never been held sufficient to withdraw a case from the general rule. The only question that has been ever made is, whether the estate, on which the creditor's debt is secured, is the *hereditas* of the bankrupt, not whether it is *damnosa hereditas*, or not. If any other rule were adopted, inquiries must always be made into the value of the property, with reference to the incumbrances upon it in each case, and there is no precedent of such a course having ever been adopted. Every case which has arisen may in fact be taken as an authority the other way, from the fact of no inquiry having been directed. There is another objection to the proof standing; the debt is partly paid by the proceeds of the sale, and therefore the proof cannot stand for the whole of the original debt, no such sum being now due. [The *Chief Judge*. This is a point which must have been long since settled. His Honour inquired of Mr. *Ayrton*, the registrar, as to the practice. Mr. *Ayrton* said that payment from a third party, after proof, made no difference, and that the creditor having proved might obtain all he could from any collateral security, and yet receive the dividends upon the whole amount proved, so that the whole amount received did not exceed 20s. in the pound.] The arguments we have already urged proceed upon the supposition that the Commissioner's report is correct; but the finding is wrong upon the face of the report, being at variance with the facts there stated. The only debts of the father, which are mentioned, are debts due from him jointly with the bankrupt; consequently, by the existence

of the mortgage, the joint debtors will be prevented from being paid out of the father's estate, and will be thrown upon the son's; a result, in which it cannot be correct to say that the assignees are not interested.

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Mr. *Bacon* for the respondents.

The CHIEF JUDGE.—When *A. B.* mortgages his estate to his creditor, who is also a creditor of *A. B.*'s son, and *A. B.* dies, and the estate descends to the son, but so incumbered with the debts of the father, that the son can derive no benefit from the estate,—in such a case I think the circumstance of the legal estate descending upon the son makes no difference, because the bankrupt's estate neither gains, nor loses, by the existence of the mortgage, the property in the bankrupt is merely nominal, the whole value of it being exhausted by others. It is not a case within the ordinary rule; but the creditor has a right to treat the mortgage as a security on the property of a person, other than the bankrupt. The argument for the respondents may therefore be confined to the last point raised, as to the debts of the father being joint debts.

Mr. *Bacon*. *Ex parte Peacock* (a) settled long ago, that a security on the estate of a partner was to be considered in the same way as a security upon the estate of strangers, as far as regards the question before the Court. If the father were alive, and his estate were administered under the fiat as well as the son's, the creditor might prove against the latter estate for the joint debts, without giving up the security. With regard to

(a) 2 Gl. & J. 27.

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the argument that the property is the property of the bankrupt, because a mere legal estate descended upon him, it is one which it is idle to attempt to maintain in a Court of Equity. [The *Chief Judge*. You need not trouble yourself with that part of the case, I cannot conceive that the question who has the mere legal estate can be at all material.]

Mr. *Swanston* in reply referred to *Carvalho v. Burn (a)*, and *Tibbits v. George (b)*.

V. C. KNIGHT BRUCE, C. J.—In this case a father and son execute a joint and several bond to a creditor, and, as a further security, the father equitably mortgages a part of his real estate for the debt. The father dies, and the real estate descends to the son, and then the son becomes bankrupt. The question is, whether the creditor can prove his whole demand under the fiat against the son's estate, without deducting the value of the mortgage security. *Primâ facie*, he ought not to be allowed to do so, the estate of the father having descended upon the son before the bankruptcy. But this state of things is suggested,—and, now, is proved to have existed,—namely, that the father was at his death indebted to such an extent, that no beneficial interest in the property descended to the son; so that, if the mortgage debt were annihilated, the other debts of the father would more than exhaust his estate, leaving nothing in the shape of an interest or estate to be enjoyed by the son. This state of things, I am of opinion, renders the case an exception to the general rule; as, in effect, the creditor

(a) 4 B. & Ad. 382; 1 Ad. & Ell. 883; 7 Sim. 109; and 4 M. & C. 697.

(b) 5 Ad. & El. 111.

is able to state truly that he takes no part of the bankrupt's estate, within the just expression and interpretation of the rule.

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But the case has this specialty, that the debts, which so exhaust the assets of the father, are debts due from the partnership which existed between the father and the son, and are therefore debts of the son proveable under his bankruptcy. I can conceive, that in such a state of things a case of complexity and difficulty might arise. But I have before me the finding of the Commissioner, against which no exception has been taken, that the bankrupt has no beneficial interest in the mortgaged property, and all that is alleged in answer to this is, that the facts found do not warrant the conclusion. I however do not at present see anything in the facts stated, inconsistent with the finding. It is just possible, that the result of a further reference might show this to be the case; but, considering that there has been already an opportunity of bringing forward such a state of facts under the leave to state special circumstances, and having regard to the amount in dispute, I consider myself bound to act upon the report, and to say that the state of the father's debts and assets takes the case out of the general rule, and that the applicability of the rule is not restored by the special circumstances of the case. With regard to the costs, this is not a case in which the mortgage was made by the bankrupt; I think the costs of the sale and of the account should come out of the proceeds of the sale, and the rest of the costs, under the circumstances, out of the general estate.

Ordered accordingly.

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*Lincoln's Inn,
March 4 and 6.*

A person deposits a bill of exchange for 12,000*l.*, payable to his order, and also a warrant of attorney, executed by the acceptor of the bill, and expressed to be made to secure (among other things) the payment of the bill. The purpose of the deposit is, and is by the accompanying memorandum expressed to be, to secure the payment of another bill for 3000*l.*, accepted by the depositor. The deposited bill is not indorsed. On the bill for 3000*l.* becoming due, it is renewed, the deposited documents remaining in the possession of the holder of this bill, and a

Ex parte THOMAS ELLIOT PRICE.—In the matter of
JAMES GIBBS.

THE petitioner in this case claimed to be an equitable mortgagee, by deposit, of a bill of exchange for 12,332*l.* 14*s.* 9*d.*, a warrant of attorney for 40,000*l.*, and two policies of assurance. The bill of exchange, which was payable to the bankrupt, or order, was not indorsed by him, and the petition prayed that the assignees might be ordered to indorse the bill, and then for the usual order of sale, as in the case of an equitable mortgage. The following were the circumstances of the case:

On the 22d of June 1842, one *William Pyne*, on behalf and as the agent of the bankrupt, requested the petitioner to discount a bill for 3000*l.*, drawn by *Pyne* upon and accepted by the bankrupt, offering to deposit the securities in question as a security for the payment of the sum made payable by the bill of exchange for 3000*l.* The petitioner acceded to the request, and gave *Pyne* a cheque for 2900*l.*, who, on receiving such cheque, deposited the securities with the petitioner. The bill of exchange of 12,332*l.* 14*s.* 9*d.* was dated the 23d of May

new memorandum of deposit being signed, which states the deposit to have been made on the day of the date of the new bill. This bill is renewed in the same way, and the transaction is repeated on several successive occasions, each transaction taking place through the agency of a person, who is the solicitor of the acceptor of the deposited bill for 12,000*l.*, and who, as such solicitor, attested the execution of the warrant of attorney; but no further notice of any of the transactions is given. *Held*, on the depositor becoming bankrupt,

1. That the deposit must be considered to have been made at the time of the first transaction, and not to have been made afresh at every succeeding one.

2. That the interposition of the solicitor of the party, who executed the deposited warrant of attorney, was not notice to that party, so as to take the security out of the reputed ownership of the depositor.

3. That the circumstance of the warrant of attorney being expressed to be executed for the purpose of securing the payment of a sum primarily secured by a negotiable instrument, did not supersede the necessity of notice as to the warrant of attorney.

4. That the deposit of the bill of exchange, though not indorsed, was good, without notice; and that the deposit was entitled to have it indorsed, and to the common equitable mortgagee's Order.

1842, was drawn by the bankrupt upon and accepted by Lord *Wellesley*, and was payable to the bankrupt, or his order, three months after date thereof. It was made payable at the office of *Pyne*, who was then, and had ever since been, Lord *Wellesley's* solicitor. The warrant of attorney was dated the 23d of May 1842, and was executed by Lord *Wellesley* to the bankrupt for 40,000*l.*, to secure the payment of the bill of exchange for 12,332*l.* 14*s.* 9*d.*, and of another bill of exchange, not now in question. The policies were effected by the bankrupt on Lord *Wellesley's* life, and were effected in offices in which the assured did not participate in the profits. The petitioner deposed, that when the bill for 12,332*l.* 14*s.* 9*d.* was deposited, he did not observe that it had not been indorsed, and that on receiving it he placed it with the other securities in a safe, where they had all remained ever since. Upon the bill for 3000*l.* becoming due on the 2d of July 1842, the bankrupt, through *Pyne*, paid the amount, and at the same time sent another similar bill of exchange for 3000*l.*, dated the 1st of July 1842, to be discounted. The petitioner discounted it accordingly, by returning 2900*l.* of the money which he had just received; and upon this last-mentioned bill becoming due, instead of paying it, the bankrupt sent another bill for the like amount, with a bonus for the renewal, and took back the former bill. This transaction was repeated from time to time as each successive bill became due. The bill of exchange for 12,332*l.* 14*s.* 9*d.*, and the several other securities, remained in the petitioner's possession, as a security for the payment of each successive bill; and a fresh memorandum explaining the purport of the deposit, and similar in terms to that set out below, was signed upon the

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occasion of every renewal; the deposit being in each successive memorandum stated to have been made on the day of the date of the memorandum. The last of these transactions took place on the 1st of March 1843, when *Pyne* delivered to the petitioner a bill of exchange of that date for 3000*l.*, drawn by *Pyne* upon and accepted by the bankrupt, and made payable at nine days from the date thereof. Upon receiving the bill, the petitioner delivered up a former bill which had just become due, and an accompanying memorandum, and received a memorandum in similar terms, and to the following effect:—

“ London, March 1st, 1843.

“ Sir,

“ As agent for Mr. *James Gibbs*, I have this day deposited with you, as a collateral security for payment of a bill of exchange of 3000*l.*, drawn by me upon and accepted by the said *James Gibbs*, at nine days date, the following securities, namely, a bill of exchange for 12,332*l.* 4*s.* 9*d.*, drawn by the said *James Gibbs* upon, and accepted by the Honourable *W. P. T. Long Wellesley*, at three months date; and a warrant of attorney executed by the said *W. P. T. L. Wellesley*, to secure the said bill; also three policies of assurance upon the life of the said *W. P. T. L. Wellesley*, in the British Commercial Insurance Office for 5000*l.*, and one in the United Kingdom for 5000*l.*, and one in the North British for 3750*l.*; and in the event of the said bill for 3000*l.* not being paid at maturity, I hereby authorize you to sell or otherwise dispose of the said securities, and pay the same.

“ Your's obediently,

“ *William Pyne.*”

At the same time *Pyne* also gave the petitioner, as a bonus for the renewal, a cheque for 100*l.*, drawn by the bankrupt upon his bankers in favour of the petitioner. The petitioner stated in his affidavit in support of his petition, that, although at the time of the deposit it was expected that the bill for 12,332*l.* 14*s.* 9*d.* would eventually be paid by the acceptor upon his succeeding to certain property, it was not expected that the bill would be paid on its arriving at maturity, unless that event had previously happened, and that it had not yet taken place; that it was not required or understood between the parties, that the petitioner should go through the form of presenting the bill when due, unless such event had happened, it being well known that *Pyne* had no effects of the acceptor with which to meet the bill, and would not be likely to have such effects, unless the contingency had occurred; that under these circumstances the bill, although overdue, had not been attempted to be presented, but had, with the full knowledge and concurrence of the bankrupt and *Pyne*, remained in the petitioner's possession. It appeared that notice of the deposit of the policies had not been given at the insurance offices, before the issuing of the fiat; but the petitioner submitted that Lord *Wellesley* must be held to have had notice of the deposit of the securities with the petitioner, such deposit having been made by *Pyne*, who was Lord *Wellesley's* solicitor, and who, as such solicitor, attested the execution of the warrant of attorney.

The fiat issued on the 11th of March 1843.

The prayer was for an account of what was due to the petitioner for principal and interest on the bill for 3000*l.*, and for the premiums paid by the petitioner in

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keeping on foot the policies, and that the assignees might be ordered to indorse the bill of exchange for 12,332*l.* 19*s.* 4*d.* in such manner as the Court might think fit; and that the latter bill of exchange, and the several other deposited securities, and the several debts and sums of money thereby secured, might be sold, with liberty for the petitioner to bid; and with the usual directions as in the case of an equitable mortgage with a written memorandum.

Mr. *Swanston*, and Mr. *De Gex*, in support of the petition. The ground upon which the petitioner's security is disputed is, that proper notice has not been given to Lord *Wellesley*, or the insurance offices, of the deposit with the petitioner; formal notice not having, we admit, been given till after the date of the fiat. But there is no foundation for the objection; for notice is not necessary in a case like the present. The deposited bill of exchange of Lord *Wellesley*, which is the principal security, being a negotiable instrument, could, with the amount for which it is drawn, be transferred without notice being given to the acceptor. Nor will the accidental want of indorsement make any difference. It was deposited as a security, and of course the depositor had an equity to call for that additional act, of indorsement, without which the security would be unavailable; *Ex parte Byas* (a), *Smith v. Pickering* (b), *Ex parte Greening* (c), *Ex parte Mowbray* (d), *Ex parte Brown* (e), *Ex parte Rhodes* (f), *Watkins v. Maule* (g). As to the other securities, the later decisions of the Court of

(a) 1 Atk. 124.

(b) Peake, 69.

(c) 13 Ves. 206.

(d) 1 Jac. & Walk. 428.

(e) 1 Gl. & J. 407.

(f) 3 M. & A. 217.

(g) 2 Jac. & Walk. 243.

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Review, until the case of *Ex parte Arkwright* (a) was decided by your Honour, were against the doctrine that absence of notice to the debtor ought to be conclusive, on the question of reputed ownership. And, although your Honour thought, in *Ex parte Arkwright*, that the older cases prevented the Court from following the later decisions of the Court of Review upon this question, it was merely on the ground of authority and precedent; and there would, therefore, be no disposition to extend the principle beyond the bounds to which the decisions have carried it. Now this case differs from former cases in many particulars, one being that the policies and warrant of attorney depend entirely on the bill of exchange for 12,332*l.* 14*s.* 9*d.* The warrant of attorney expresses, on the face of it, that it is given to secure the amount of this bill and another; and the only insurable interest in the policies is the amount of this bill. No person could, therefore, advance money on these securities, without inquiring after the principal security, the bill itself,—nor, in fact, without having that document in his possession,—it being known that the property in the sum, for which it was accepted, might be transferable by simple delivery, and without notice being given to any one. The peculiar circumstances of the case, therefore, exempt these securities from the general rule. Besides, a distinction has been lately taken by Courts of law, between mortgages of choses in action by assignment, and mortgages which arise by mere deposit of documents; and it is now established that, in the latter case, notice is not requisite; *Gibson v. Overbury* (b). [The *Chief Judge*. That case merely decides that the document cannot be recovered in an action of trover.] Yet such a

(a) *Ante*, p. 129.(b) 7 *Mees. & Wels.* 555.

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decision at law is all that is requisite to lay the foundation of an equitable right to realize the security. The rights of equitable mortgagees of real property, by deposit of title deeds, rests upon that foundation. The deeds cannot be recovered in an action of trover from the equitable mortgagee; and at first it was considered, as Lord *Eldon* has stated, that equity would leave the depositary to the only remedy which he had provided for himself, that of compelling payment by the embarrassment to which he subjected the depositor, by withholding his deeds (*a*), and by preventing him from dealing with his property or enforcing his rights with respect to it. But afterwards the right of realizing the security was extended to the mere depositary of the title deeds of real estate, and it would be introducing mere arbitrary and groundless distinctions, not to make the legal right to retain, the criterion of the equitable right to render the security available, in the one case as well as the other.

If, however, notice was necessary, there was notice here; that is, there was sufficient constructive notice to be a compliance with the rule. *Pyne*, who negotiated all the transactions, was Lord *Wellesley's* solicitor, and had attested the warrant of attorney in that character; he had notice of the deposit, and his client was affected with that notice; *Tibbits v. George* (*b*). Much slighter notice has been held sufficient, to prevent the 72d section from applying; *Duncan v. Chamberlayne* (*c*).

Mr. *Russell*, and Mr. *Bacon*, for the assignees. First, the whole transaction is bad; for each renewal, and the

(*a*) *Ex parte Whitbread*, 1 Rose, 300; 19 Ves. 209. And see *Ex parte Hooper*, 19 Ves. 479.

(*b*) 5 Ad. & El. 115.

(*c*) 11 Sim. 123.

accompanying deposit, must be taken as a separate transaction; and the last transaction took place only ten days before the fiat issued, and after the act of bankruptcy, of which the petitioner cannot maintain that he had no notice. [The *Chief Judge*. But the deposit was made on the 22d of June 1842.] The very memorandum, under which the petitioner claims, states the deposit to have been made on the 1st of March 1843; and the statements of the petition show the transactions to have been several and distinct. It therefore entirely depends on the validity of the last deposit. [The *Chief Judge*. It is quite clear, what the nature of the transaction was; the deposit was made to secure the payment of the bill of exchange first accepted by the bankrupt, and was thenceforth continued, as the bill was from time to time renewed.] At all events, no equity has been made out to have Lord Wellesley's bill indorsed. In *Ex parte Mowbray* (a), the whole property in the bill had been parted with; it must have been the intention to indorse the bill, and the decision was made on the equitable ground of mistake, which is not here satisfactorily made out. It is remarkable, also, that Lord Eldon's attention was not in that case called to *Ex parte Monro* (b) and that class of cases; and therefore the question of reputed ownership was not discussed. [The *Chief Judge*. Is there any trace of a recognition by Lord Eldon of the principle of *Ex parte Monro*? (b) It was decided eight years before Lord Eldon resigned the great seal, and the subject was likely to be one of frequent occurrence. It appears singular, that no case arose in which it was acted upon by him during that period. If I had been at liberty to treat the question, as *rem integram*, I do not say how I should

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(a) 1 J. & W. 428.

(b) Buck, 300.

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have decided; but I consider the point settled by authority, and have already disposed of more than one case upon that view.] In the other case of *Ex parte Brown*(a) the question was not disputed, and that case cannot, therefore, be treated as indicating the opinion of the Court upon it. Besides, the order there was not that which is here sought, but merely gave permission to sue in the names of the assignees. The petitioner does not say he acted on the belief that the bill was indorsed, or that the bankrupt agreed to indorse the bill, and it is very improbable that a bill for 12,000*l.* would be indorsed to secure a debt of 3000*l.* [The *Chief Judge*. How could it be available as a security, without being indorsed?] By being withheld from the bankrupt. [The *Chief Judge*. Has the bankrupt, or *Pyne*, made any affidavit?] No. It is a mistake to call the bill a negotiable security, it would have become negotiable by indorsement; but, before indorsement, the debt is exactly in the same condition, as any other debt to which the custom of merchants does not extend. To bring the case within the custom, what the custom requires must have been done, and there is no equity to dispense with it, except under circumstances of fraud or mistake, or other special equitable grounds. Without these, the general law applies, which requires notice to be given to the debtor. The same law applies to all the deposited securities; and as regards the warrant of attorney and the policies, there is no ground whatever for contending that they are to be exempted from the rule.

Mr. *Swanston*, in reply, was stopped by the Court.

(a) 1 Gl. & J. 407.

V. C. KNIGHT BRUCE, C. J.—Whether the general rule is well or ill founded, and whether the exception is well or ill founded in principle, both the rule, and the exception, are established by authorities which are binding upon this Court. The general rule was settled by *Ex parte Monro(a)*, and the exception is equally well established in the case of a negotiable security, such as a bill of exchange, or a promissory note, payable to order. The petition must be dismissed with costs, so far as regards the policies and the warrant of attorney. As to the bill of exchange, there must be a reference to the Commissioner to inquire what is due for principal and interest upon the security of the deposit. I do not now order the assignees to indorse the bill; but I wish it to be understood that I make this Order, because I consider this a case in which the Court will order the bill to be indorsed, when the proper time arrives for making that Order.

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(a) Buck, 300.

Ex parte BRAMHALL CLARKE and others.—In the matter of WILLIAM ROSCOE, JOHN CLARKE, and WILLIAM STANLEY ROSCOE.—

THIS was the petition of the real and personal representatives of the above-mentioned bankrupts, all of whom were now dead, praying that a joint commission, and a subsequent fiat in the nature of a renewed commission, which had issued against the bankrupts, might be superseded and annulled, under the provisions of the 133rd and 134th sections of the 6 Geo. 4. c. 16.

Lincoln's Inn,
March 6.

Order made for superseding a commission, and annulling a subsequent fiat, under the composition contract clauses, sections 133 and 134 of the 6 Geo. 4. c. 16.

It appeared that in the year 1816, the bankrupts, who were bankers at Liverpool, being then in difficulties,

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made arrangements with their creditors for paying their debts in full, by six yearly instalments of 3*s.* 4*d.* in the pound, together with interest at 4*l.* per cent.; and that the two first instalments, with interest, were duly paid, but that they were not able to pay the third instalment. In consequence of this default, a joint commission of bankrupt was issued against them on the 18th of January 1820, under which they all obtained their certificates on the 31st of March 1820. The separate estate of *John Clarke* had paid a dividend of 20*s.* in the pound, and a considerable part of his estate was carried to the joint estate; the separate estate of *W.S. Roscoe* had paid a dividend of 17*s.*, and the separate estate of *W. Roscoe* a dividend of 3*s.* 2*d.*; and the joint estate had paid a dividend of 8*s.* 7*d.* in the pound, in addition to the two instalments of 3*s.* 4*d.* each paid before the bankruptcy. Part of the separate estate of *John Clarke*, which consisted of collieries and coal mines, was not sold by the assignees, but the collieries were worked by them for the benefit of the creditors. On the 6th May 1842, three of the Commissioners having died, a fiat in bankruptcy, in the nature of a renewed commission, was issued, under which fresh assignees were chosen. *John Clarke* died intestate on the 15th August 1821, leaving a widow and several children. Administration of his personal effects was granted to the widow, and the petitioner *Bramhall Clarke*, his eldest surviving son, was his heir at law. The widow and the other children were parties to this petition.

W. Roscoe died in the year 1831, leaving three executors, of whom *Robert Roscoe*, the only survivor, was a party to this petition.

The new assignees under the fiat, not wishing to incur

any personal responsibility in continuing to work the collieries, which formed part of the separate estate of *John Clarke*, and being determined to deal with them in the due course of administration in bankruptcy, his family, for the purpose of preventing a sale of this property, proceeded to avail themselves of the provisions of the 133rd and 134th sections of the 6 *Geo.* 4. c. 16., in order that the commission and fiat might be superseded and annulled. Accordingly, on the 20th and 23rd June last, they inserted an advertisement in the *London Gazette*, whereby all the creditors who had proved their debts were desired to attend a meeting at Liverpool on the 26th of July, to decide upon accepting or refusing any offer of composition then to be made by the survivor of the bankrupts, or their friends. The meeting was held on the day appointed, when the friends of *John Clarke* and *W. Stanley Roscoe*, in the presence of the creditors' assignees and the official assignee, offered to pay all the creditors a composition of 1s. in the pound upon the amount of their several debts; upon which the creditors present appointed two of the joint creditors to examine into the value of the remaining property of the bankrupts, and upon the expediency of accepting such offer. On the 1st August last a second advertisement was inserted in the *London Gazette*, and also in most of the *Liverpool newspapers*, appointing another meeting of creditors for the 23rd of August; on which day the meeting was accordingly held, when, on the report of the two creditors to whom the offer had been referred, all the creditors then assembled unanimously agreed to accept the composition. In further pursuance of the provisions contained in the 133rd section of the act of parliament, another meeting of creditors for the purpose

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of deciding upon such offer, being in fact the second meeting required by that section, was appointed to be holden at the District Court of Bankruptcy in Liverpool on the 30th of November last, of which also due notice was given in the London Gazette and in most of the Liverpool newspapers. Before this meeting, however, the surviving bankrupt, *W. Stanley Roscoe* died, leaving executors, who were parties to this petition. The meeting was attended by fifty-two creditors, whose debts were the largest in amount, when after full consideration the creditors then present unanimously agreed to accept the offer of composition. The Commissioner thereupon adjourned the meeting to the 2nd of December, and again to the 4th December, on both of which days several other creditors attended, and also unanimously agreed to accept the offer. Besides the advertisement in the Gazette and newspapers of the several meetings above-mentioned, printed circulars containing notices to the same effect, as well as notices of the two adjourned meetings, were likewise transmitted by the post to all such of the creditors whose addresses were known, or to the legal representatives of such creditors.

The petition averred, that at the above meetings all the forms and proceedings required by the Act of Parliament, and Lord *Eldon's* General Order(a), were duly complied with, and in particular, that at the second meeting and the two adjourned meetings, the creditors then present (who accepted the offer) testified that they accepted the same, by signing their names to a memorandum in writing expressly declaring such acceptance; and that the Commissioner duly made the proper certificate required by the above General Order. By the

(a) 27th June, 1826. See 2 Desc. B. L. 104.

Commissioner's certificate, he certified that the creditors who had proved debts were 577 in number; that the debts amounted to 201,056*l.*; that the creditors assenting to the composition were eighty-four in number, and that their debts amounted to 79,826*l.*; and that sales and conveyances had been made of the real estates of *W. Roscoe* and *John Clarke*, and of the personal estates of all the three bankrupts.

The petition then alleged, that, since the Commissioner made his certificate, divers other creditors who had proved debts had come in and accepted the offer, and that, so far as the petitioners knew or believed, no creditor who had proved a debt had refused or was unwilling to accept the composition. That immediately after the certificate of the commissioner, notice was published in the *London Gazette* and several of the *Liverpool newspapers*, that the composition was then payable to all the creditors, and that each might receive the same personally, or by agent, by application at the office of the official assignee in *Liverpool*; that on the 10th December last a second notice was published to the like effect; and that in several subsequent *Gazettes* and newspapers the same notice was repeated. That the debts proved by the creditors, who had actually received the composition, amounted to 172,583*l.*, and that the amount actually paid was 8642*l.*, leaving a balance still to pay of 1409*l.*, which was deposited in the *Bank of Liverpool*, and was ready to be paid to the other creditors as soon as they respectively might claim the same. And that the assignees were fully satisfied that the above agreement and composition was a beneficial arrangement for the creditors, and that all the proceedings for effecting the

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same were taken *bonâ fide*, and with their entire approbation.

The facts stated in the petition were duly confirmed by affidavit.

Mr. *J. Russell*, and Mr. *Mylne*, appeared in support of the petition.

Mr. *Swanston*, and Mr. *Glasse*, consented, on the part of the assignees.

V. C. KNIGHT BRUCE, C. J. after perusing the 133rd and 134th sections of the 6 *Geo.* 4. c. 16., and being satisfied that the several requisitions of the act, and of the General Order, had been complied with, said, that he had great pleasure in granting the Order for the *superseas*, and that the assignees, at the expense of the petitioners, should execute any release which might be required of the freehold property.



Ex parte ELLIS and another.—In the matter of
MUSGROVE.—

Lincoln's Inn,
March 18.

On taxation of costs, a charge for consulting counsel previously to presenting the petition, and a fee to a second counsel on the hearing, if the petition is one of a special nature, ought to be allowed.

THIS was an application on the part of the bankrupt to review the taxation of a bill of costs, in consequence of the disallowance of certain items by the taxing officer. It appeared that the bankrupt, shortly after the issuing of the fiat, presented a petition to annul it; and a cross petition was also presented by the petitioning creditors for the same purpose, and praying further, that they might be at liberty to issue another fiat (a). Upon the

(a) See *ante*, p. 386.

hearing of these petitions, an Order was made for annulling the fiat, and directing that the costs of so annulling it, and also the costs of and attending and incident to the petition should be paid by the petitioning creditors. The first item which the taxing officer had disallowed was a charge of 1*l.* 10*s.* 2*d.* for obtaining the opinion of counsel after the petitioning creditors had presented their petition, as to the course it would be proper for the bankrupt to pursue.

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Mr. *Swanston*, for the bankrupt, submitted that this was a proper and prudent measure adopted by the bankrupt, as a preliminary step to presenting his own petition.

Mr. *Anderdon* contended that the rule was not to allow any costs which were incurred antecedently to the presentation of the petition, and that the charge which had been disallowed could not be considered to be any portion of the costs incidental to the petition.

V. C. KNIGHT BRUCE, C. J.—I do not imagine that the practice, of disallowing on taxation any costs incurred before the petition was presented, has become so inveterate as to have the force of a rule. The charge objected to is for consulting counsel, previous to the bankrupt presenting his petition to annul the fiat. A second petition for this purpose might be a superfluous, a litigious proceeding; but, supposing it not to be such, then the question is, whether the charge for taking the opinion of counsel, as to the propriety of such a proceeding, ought to be allowed. The whole matter rests on the expediency of the second petition; the two petitions for the same purpose create all the difficulty

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and specialty of the case; and the bankrupt might be reasonably anxious to be advised upon what act of bankruptcy the petitioning creditors could be allowed to proceed, in the issuing of another fiat; and I observe, that the Court on the former occasion intimated its opinion, that the petitioning creditors ought not to strike another docket upon the act of bankruptcy, on which the prior docket proceeded. I think, under these circumstances, that the resort to counsel, before presenting the petition, was discreet, reasonable, and proper. I am perfectly satisfied, that the Court is not bound by any rule on the subject, and that the charge which has been struck out ought to be allowed.

Mr. Swanston. Another charge has been disallowed of 2*l.* 4*s.* 6*d.*, the amount of a fee to a second counsel, on the hearing of the petition.

Mr. Anderdon contended that there was no necessity for instructing two counsel.

The CHIEF JUDGE.—I have always felt the injustice of subjecting a successful litigant party to an expense, which has been unavoidably incurred by him. One of the questions in this case was, whether an act of bankruptcy had been committed under a recent statute, that created an entirely new and complex act of bankruptcy. I think that question was of sufficient importance to justify the bankrupt in requiring the assistance of two counsel. The case has been thought worth reporting, and is treated as one of a very special nature. Had it been a frivolous one, there would then have been no need to instruct a second counsel; but, under all the circum-

stances, I see no reason why this charge should not be allowed.

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Mr. *Swanston* then stated, that the officer had disallowed a fee paid to counsel for drawing the petition.

Mr. *Anderdon*. A mere petition to annul a fiat does not require the skill of a counsel to draw it.

The CHIEF JUDGE.—I am of opinion, that it was very proper to have the petition in this case settled by counsel.

Mr. *Swanston*. The next items disallowed are for several attendances and letters of the bankrupt's solicitors, occasioned by a proposed variation in the Order, which was the subject of a negotiation between the parties, for the purpose of annulling the fiat by consent, to render unnecessary a contested petition on the subject.

Mr. *Anderdon*. The proposed variation in the Order was, that the petitioning creditors were to pay to the bankrupt, not only his costs, charges and expenses of and incidental to their application to annul the fiat, but also his costs of and occasioned by the fiat. This was not conformable to the practice of the Court.

The CHIEF JUDGE.—The provision for the payment of the bankrupt's costs of annulling the fiat, and incidental thereto, were, it appears, omitted in the form of the Order proposed on behalf of the petitioning creditors. A proposition is then made by the successful party, who however insisted on such an alteration in the Order as was untenable. But the Order itself, as originally

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framed, was not fit to be accepted by the bankrupt. Both parties, therefore, were wrong; and I think the costs attending the negotiation to settle the terms of the Order should have been allowed by the taxing officer; who, however, is not to blame for any of these disallowances, as he appears to have followed what he considered a proper precedent. Each party must pay his own costs of the present application.



Ex parte FRANCIS COLLINS.—In the matter of THOMAS
THOMAS.—

Lincoln's Inn,
April 1.

Where an Order was made by a District Commissioner on a solicitor to pay a certain sum to the official assignee, without stating the special facts on which the Order was made, or that the party was a solicitor of the Court, or that he acquiesced in the Order; *held*, that the Commissioner had no jurisdiction to make such an Order.

THIS was a petition of the solicitor to the fiat, praying to rescind an order of the Commissioner, by which the solicitor was ordered to pay to the official assignee a sum of 57*l.* 13*s.* 8*d.*, and also to appear before the Commissioner on a given day, to show cause why the costs occasioned by that sum having been withheld by the petitioner, and incident to that rule, should not also be paid by the petitioner.

It appeared that in March 1842, a Mr. *W. Thomas*, since deceased, instructed the petitioner to issue a fiat against the bankrupt; but, previous to this being done, the petitioner required a guarantee for the costs, upon which *W. Thomas* and his son *John Thomas* signed a guarantee addressed to the petitioner, by which it was stated that, in consideration of the petitioner issuing a fiat upon the petition of *W. Thomas* against the bankrupt, and prosecuting the same up to the final close thereof, *W. Thomas* and *J. Thomas* jointly and severally undertook to pay and guarantee to the petitioner the due pay-

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ment of his bill of costs, as between attorney and client, for issuing and prosecuting the fiat, after deducting the sum received from the bankrupt's estate), as soon as the same should have been made out and delivered to either of them, the said *W. Thomas* and *J. Thomas*. A fiat was accordingly issued against the bankrupt by the petitioner, on the application of *W. Thomas* as petitioning creditor; and the petitioner was continued as the solicitor to the estate, after the choice of assignees. The petitioner's costs up to the choice of assignees were taxed at 61*l.* 18*s.*, and a bill of costs subsequent to the choice of assignees, had been also made out by the petitioner to the amount of 60*l.* and upwards, which he alleged that he was willing to have taxed, with the addition of the messenger's fees which had been paid by him, amounting to 5*l.* 6*s.* 8*d.*, making a total due to the petitioners of 127*l.* 4*s.* 8*d.* The petitioner alleged that *W. Thomas* from time to time paid to him various sums of money on account of these costs, and that he had also received two small sums of 2*l.* 1*s.* 10*d.* and 3*l.* 6*s.* 6*d.* on account of the estate, amounting in the whole to the sum of 93*l.* 19*s.* 5*d.* received by the petitioner, and leaving a balance of 33*l.* 5*s.* 3*d.* due to him. The official assignee claimed from the petitioner a balance of 57*l.* 13*s.* 8*d.*, as due to the bankrupt's estate, insisting that all monies which had been paid by *W. Thomas* to the petitioner were part of that estate, and that, after deducting the amount of the petitioner's bill of costs to the choice of assignees, as taxed, and the amount of the messenger's bill, the solicitor was bound to pay the official assignee the above balance. The petitioner stated, that the official assignee had charged him in respect of sums paid by *W. Thomas* to the petitioner, on account of other business done by the peti-

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tioner for *W. Thomas*, and in respect of two other sums never received by the petitioner. The petitioner contended, that none of these sums formed part of the bankrupt's estate, or, at all events, that they were not liable in the hands of the petitioner to be treated as such; and that, even if they were so treated, not more than 5*l.* or 6*l.* would then be due from the petitioner to the estate. The petitioner was summoned to appear before one of the Commissioners of the District Court of Bankruptcy at Birmingham on the 16th February 1844, to account for the sums so received by him; when he attended by his agent to show cause against any Order being made on him for the payment of the sum claimed by the official assignee, and filed an affidavit in opposition to such claim. On the hearing of the summons, the Commissioner made the order complained of, which was now sought to be set aside.

Mr. Rolt appeared in support of the petition.

V. C. KNIGHT BRUCE, C. J.—The only, or the first, question is, whether the learned Commissioner had jurisdiction to make an Order in the terms in which this Order is framed.

Mr. Bacon, for the official assignee. The petitioner submitted to the jurisdiction of the Commissioner by attending the District Court, in obedience to the Commissioner's summons; and he has no right to come here to be relieved from an Order, which was the consequence of his own submission. But, further,—if the Commissioner had no jurisdiction to make the Order, then, of course, it is a nullity, and there is no need to apply to this Court to rescind it.

Mr. *Swanston* appeared for the creditors' assignee.

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The CHIEF JUDGE.—The order may in a sense be a nullity, but I am bound, upon this petition, to pronounce an opinion upon its validity, or invalidity. The Order is not only for the payment of the sum of 57*l.* 13*s.* 8*d.*, but also requires the petitioner to show cause before the Commissioner on a given day, why the costs occasioned by that sum having been withheld should not also be paid. I certainly am not aware, that a Commissioner has any jurisdiction to make such an Order. It does not set out any of the special facts of the case, nor state that the party on whom the Order was made was a solicitor of this Court, nor that he had acquiesced in the Order, or submitted to the jurisdiction. The Order, upon the face of it, merely purports to be an order upon *A. B.* to pay a debt which, as it is stated, he owes to, and withholds from, *C. D.* I speak with perfect respect for the office and person of the learned Commissioner ; but certainly Courts of Bankruptcy were not established to try and determine questions of debt between an alleged debtor to the bankrupt's estate and the bankrupt's estate, and to order execution against the alleged debtor for debt and costs. I am bound to say, that, in my opinion, this Order has no validity, as it was beyond the functions of the learned Commissioner. There is no ground for saying that the petitioner acquiesced in the Order, or so submitted to the jurisdiction as to preclude him from this application. The Order must therefore be discharged, and the petitioner's and respondents' costs be paid out of the estate ; the Commissioner having regard, in taxing the respondents' costs, to the fact of their appearing separately on the petition ; and this Order to be

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without prejudice to any question of debt or account between the parties (a).

(a) The reporters have been favoured with the following judgment of Mr. Commissioner *Goulburn*, in reference to the above case, which was delivered by him when filling the office of Commissioner of the District Court of Bankruptcy at Exeter, on the occasion of a difficulty being suggested to him by a solicitor, (who had seen an incorrect report of the above case in the newspapers), whether, in working up old flats,—that is to say, those in operation before the passing of the 5 & 6 Vict. c. 122, which transferred the jurisdiction in bankruptcy from the former country Commissioners to the Commissioners of the District Courts,—the District Court had power to compel assignees under those flats to pay over any money in their hands belonging to the bankrupt's estate.

“COURT OF BANKRUPTCY FOR THE
EXETER DISTRICT.

10th April 1844.

“MR. COMMISSIONER GOULBURN.

I am very glad that my attention has been called to the case of *Ex parte Collins, in re Thomas*, which I have myself seen reported, or rather, I ought to say, somewhat mis-reported, in one of the London papers. In consequence of what appeared there, I felt it my duty to get an exact account, from a reporter who attends the Court of Review, of what actually took place; and I also thought the matter of sufficient importance to induce me to communicate with the Chief Judge of the Court of Review. As to the real facts of the case, taking them from that reporter's account, there can now, therefore, be no misapprehension. It appears that a fiat, issued previously to the passing of the act, under the authority of which we, the country Commissioners, sit, had

been transferred into the Court of Bankruptcy for the Birmingham District, and the usual Order had been made, directing the assignees to bring into that Court all the monies, books, papers, and documents connected with the estate, in their possession and custody, as assignees. Such books and papers having been brought in and examined, it turned out that the solicitor under the fiat had received a certain sum of money, which he had not paid over to the assignee. Under these circumstances, the learned Commissioner did that which he was clearly bound to do; he summoned the solicitor before him, in order to show cause why he had not paid over the money. The solicitor came, in obedience to the summons, and acknowledged the receipt and non-payment of the money, and was considered to have acquiesced in an Order being made upon him for the payment of the amount, or, at least, in the jurisdiction. An Order was thereupon made, importing merely upon the face of it, that the solicitor was to pay the money, without setting out any one of the facts. After the Order was made, the solicitor, although he was considered to have acquiesced in its being made, refused to obey it; and it was under these circumstances that the matter was submitted to the judgment of the Court of Review. That Court simply decided, what it did not need its high authority to determine—that, in making an Order upon the solicitor simply to pay a debt, the Commissioner had exceeded his jurisdiction,—that Courts of Bankruptcy were not established to try and determine questions of debt, and to order immediate execution,—and that the Order in that case, not setting out that the party on whom the Order

was made was a solicitor of the Court, or that he had acquiesced in the Order, was, on the face of it, bad, and must therefore be discharged. I think it quite right, that these facts, which are the real facts of the case, should be known; for it is highly injurious, that reports of what transpires in Courts of justice should go forth to the public, as they very frequently do, with both the law and the facts misapprehended. I have thought it the more necessary to refer to this case, because it has been supposed, though erroneously, to affect cases in which Orders have been made by this Court upon assignees under old fiats, who have appeared to have in their possession money, books, or papers, belonging to bankrupt's estates, which have come into their possession as such assignees. It frequently happens, in connection with those old fiats, which, even at this late period, are being brought into this Court—and we find generally, that those in which the bringing in of the proceedings has been so long delayed, are just those which most require investigation, and in which money has been withholden from the creditors—it is, I say, a case of frequent occurrence, that in pursuing these inquiries, we find that the assignees have either money remaining in their hands, or that they have had money of which they seek to discharge themselves, by alleging payments which they had no sort of right or authority to make. In the case to which Mr. Turner has adverted, and in which, upon an audit, we have recovered 540*l.* for the benefit of the estate, it appears that the assignees had conceived that, notwithstanding the act of parliament (under which this Court is constituted) had deprived the old Commissioners of all their jurisdiction,—and although, from the passing of the act, the power of the Com-

missioners and of the assignees further to pay or receive was at an end,—still they might go on paying and receiving, until the proceedings were actually brought into this Court. Such was their view of the law; but it is a perfectly erroneous one, and contrary to the clear meaning and intention of the act. Were it otherwise, an assignee would have nothing to do but to go on paying money, until he had frittered away and got rid of all the assets in his hands, before the fiat found its way into this Court. I think it right, therefore, to avail myself of this opportunity of stating the grounds on which I have brought my mind to the clear conclusion, that this Court has not only the power to make an Order upon an assignee, requiring him to pay over any money in his hands, but that it has all the powers of a Court of record to enforce obedience to such Order. In looking at the Act before me, the 5th and 6th Vict. c. 122, I find that the first of these questions, the power to make the Order, depends upon two of the sections, the 52nd and 53rd. By the 52nd section it is declared, that “all power, jurisdiction and authority of the Commissioners named in any fiat of bankruptcy, issued before the commencement of this act—and by the interpretation clause, the word ‘fiat’ is to be construed to include ‘commissions,’—shall cease and determine.” It then goes on to empower the Lord Chancellor to transfer and remove any such fiat, either into the Court of Bankruptcy, “or into such of the Courts authorised to act in the prosecution of fiats of bankruptcy under this act, as he may deem fit;” and it declares that “all further proceedings in every such fiat shall be thenceforth carried on in the Court to which the same shall be transferred, in like manner as if the proceedings under such fiat had been originally commenced therein, &c.”

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The fiat, then, having been so transferred under the authority given by this section, the next section, the 53d, points out what the Court, into which it is transferred, is to do. It enacts, that, on the transfer taking place, 'it shall be lawful for the Court, which shall thenceforth act in the prosecution of such fiat, at its discretion, to appoint some one of the official assignees appointed, or to be appointed, under the said recited act, or this act, to act with the existing assignees, if any, under such fiat, and to direct the existing assignees to pay and deliver over to such official assignees all monies, books, papers, and effects whatsoever, in their possession or custody as assignees.' So much, then, with respect to the power of the Court to make an Order upon an assignee to pay or deliver over to the official assignee, appointed under the authority of this act, any monies, books, or papers in his possession, belonging to a bankrupt's estate. It is perfectly clear, not only that it has the power to make such an Order, but that, by the words of this section, it is expressly enjoined to make it. This being so, the next question which arises is this—the Order having been made, what power has the Court got to enforce it? In dealing with this question, we must turn to two other clauses of the new Bankrupt Act, the 59th and the 66th; and the last of these sections is exceedingly important. The 59th section gives power to her Majesty to appoint twelve Commissioners, in addition to the then existing Commissioners of the Court of Bankruptcy, "to act in the prosecution of fiats in bankruptcy in the country;" and it then goes on to state, that any one or more of such additional Commissioners shall and may form a Court of Bankruptcy for the purposes of this act,—and that every such Court shall be authorized

to act in the prosecution of fiats in bankruptcy in the country, at such place and in and for such district, as her Majesty, with the advice of her Privy Council, may be pleased to direct." The 66th section, the next to which I shall advert, comprises no less than three different subject-matters, and for that reason, perhaps, each one of them has not been so much and distinctly considered as it might and ought to have been. In the second clause of that section, it is enacted "that any Commissioner of the Court of Bankruptcy, authorised to act in the prosecution of any fiat directed to the Court of Bankruptcy, shall be deemed and taken to be a Court authorised to act in the prosecution of such fiat." These words were introduced into the act, in consequence of a decision of the Court of Exchequer upon a case which occurred some years ago. In that case (*Rex v. Faulkner*, 2 Ment. & Ayr. 311) was discussed the right of a single Commissioner to fine for contempt—the contempt being the writing of a letter to the Commissioner, referring to certain acts done by him in his official capacity when sitting alone. One of the chief points raised by the arguments in that case, and that on which the Court appears mainly to have decided it, was this: that, although by the Act of Parliament establishing the Court of Bankruptcy that Court, consisting of four judges and six Commissioners, was constituted a court of law and equity, and was declared to have all "the rights, incidents, and privileges of a Court of record,—and although, by a subsequent section of the same act, power was given to each Commissioner to sit by himself for certain purposes,—yet there was nothing in the act to show that any single Commissioner, when so sitting, constituted a Court. It was likened to

the case of a judge sitting at chambers to transact business connected with the superior Courts, and with respect to which it was the uniform practice, if a judge made an order when so sitting, to make it a rule of the superior Court, before it was enforced by attachment. For the purpose of getting rid of this objection, the words which I have already read were introduced, declaring that any single Commissioner, acting in the prosecution of any fiat directed to the Court of Bankruptcy, shall be deemed and taken to be a Court for the prosecution of such fiat. The Court of Exchequer in that case (*Rex v. Faulkner*) decided, that no single Commissioner, sitting alone, had power to fine for contempt. That decision was declared to be law by a subsequent statute, 5 & 6 Will. 4. c. 29. s. 25., the proviso in which, however, the later act of 5 & 6 Vict. c. 122. s. 66., has repealed on the clear legal principle *Leges posteriores priores contrarias, abrogant (a)*. The last branch of the 66th section of the 5 & 6 Vict. enacts, "that every Court so authorised to act in the prosecution of any fiat, or in the execution of any duty, imposed or to be imposed on such Court by this or any other act, hereafter to be in force, shall have, use and exercise all the powers, rights, privileges and incidents of a Court of record." The former part of the section having made a Commissioner sitting alone a Court, this part of it gives to the Court so constituted, all the powers of a Court of record. I wish to direct particular attention to the words "in the execution of any duty imposed on such Court by this act;" because I think, on referring

to the 53rd section, which expressly directs the Court to order the assignees to pay or deliver over all monies &c. in their hands, it is quite impossible to deny, that the making of such an Order is a duty imposed on the Court by the express words of this statute. It is quite clear, therefore, that the Court has not only power to make the Order, but that it is expressly enjoined to make it, and that it has all the powers for enforcing it which belong to a Court of record. I have the authority of the chief judge of the Court of Review for stating, that in the case *Ex parte Collins* he decided nothing upon that point,—that that case had nothing whatever to do with it—and that his decision was confined to the single point raised by the facts which I have already detailed, and which I will not go over again. The power of the District Courts to make such Orders on assignees, as those of which I have been speaking, was in no way called in question.

We now come to inquire, what are the powers of a Court of record to enforce obedience to its own Orders? and that point has been so long settled, that it is almost superfluous to advert to it. The law upon it is very clearly and plainly stated by Mr. Justice Holroyd, in the case of *Rex v. Clement*, 4 B. & A. 218. That was a case, which determined that a court of general gaol delivery might enforce its orders by fine. At a trial for high treason, which took place at the Old Bailey, before Lord Tenterden and other judges, it was ordered by the Court, that no report of the proceedings should be published in any of the newspapers until the trial should have concluded.

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(a) *Quere*, whether, when two statutes are in *pari materia*, an express prohibition in the former one can be repealed merely by implication, and without express words for that purpose contained in the latter statute, or, at least, without words showing incontrovertibly that the manifest intent was to repeal the prohibition. See *Rex v. Lord George Gordon*, 2 Doug. 592.—E. E. D.

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In spite of that order, one of the newspapers published the first day's evidence at length, and the learned judge who presided fined the party for the contempt a sum of 500*l*. That case was fought throughout in two Courts, the Court of Queen's Bench, and afterwards in the Exchequer; and the right of a Court of record to fine and imprison for contempt of its orders was very much discussed. It is unnecessary to go at length into the arguments, but we find that the point was established beyond all question. The Attorney and Solicitor General, the late Lord Gifford, and the present Lord Lyndhurst, argued the matter very fully, and they cited from the *Prac. Reg. in Chancery*, 99, this definition of a contempt, viz. "a disobedience of the Court, or an opposing, or despising, the authority, justice, or dignity thereof,—it commonly consists in a party doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the Court." I would refer those who wish to investigate the matter more closely to the luminous judgment of Mr. Justice Holroyd, delivered in the case. He says—"Courts, inferior to the Courts at Westminster, may clearly fine and imprison for a contempt, *if they are*

Courts of record, as the Court of Quarter Sessions, or the Courts of oyer and terminer. Indeed it is the constant practice of such Courts to fine jurors who do not attend &c." I think then, looking at all these authorities, and at the different clauses of the act of parliament, there can be no doubt of the power of the Court to make such an Order, as it is expressly enjoined to make in the 53rd section, and, having made it, it has all the powers of a Court of record to enforce it, *proprio vigore*, and without reference to any other court. It is indeed perfectly true, that the Court, having made an Order, might refer the matter to the Court of Review, and call on that Court to enforce it; and probably, where there are funds in the hands of the official assignee to meet the expense of an application to that Court, such would be the best course; but it would not be so in all cases. It frequently happens that there are no funds belonging to an estate, except the property improperly kept back; and in such cases, if the power be in the Court, as I believe it is *proprio vigore*, to enforce its own order, it ought not to drive the official assignee to a more expensive and circuitous mode to attain an object, for which its own powers are sufficient.

Ex parte DANIELL and others.—In the matter of

DANIELL.—

Westminster,
April 24.

Where one of several assignees is removed, it seems that the 25th and 26th sections of the 1 & 2 Will. 4, c. 56 require, for the effectually vesting of the bankrupt's estate, that a new assignee should be appointed in his room.

THIS was the petition of creditors for the removal of an assignee, on the ground that he had gone abroad, and was not likely for some time to return to England. The fiat issued in 1835, and the assignee, Sir Wm. Daniell, who was a captain in the navy, was employed on a

foreign station, being at present in the command of the *Ringdove*, in the West Indies. The object of the petition was to effect the sale of certain real estates of the bankrupt, and to enable Mr. *Turner*, the other assignee, to complete the conveyance alone.

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DANIELL
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Mr. *Swanston*, in support of the petition, said, that a difficulty arose, in consequence of the 25th and 26th sections of the 1 & 2 Will. 4. c. 56., not providing for the case of an assignee being removed, without a new assignee being chosen in his room. The first of these sections applies to personal, and the other to real estate, and they both declare, that when any assignee shall be removed, and a new assignee duly appointed, the estate shall, by virtue of such appointment, vest in the new assignee, either alone, or jointly with the existing assignee, as the case may require, without any conveyance for that purpose. But neither section provides for the whole estate vesting in the continuing assignee, where one is removed, and there is no new choice.

V. C. KNIGHT BRUCE, C. J.—One mode of effecting the object of the petitioners would be for them to take an Order, declaring that it would be for the benefit of the estate, that Sir *Wm. Daniell* should be removed from the office of assignee, and that Mr. *Turner* should continue sole assignee, and ordering that Sir *Wm. Daniell* should make the necessary conveyance; and then application might be made by the petitioners to the Court of Chancery for a conveyance, as in the ordinary case of a trustee out of the jurisdiction. But perhaps the safer course will be to have a new choice, pursuant to the directions of the statute.

ORDER made accordingly.

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Westminster,
May 1.

A petition
signed by only
one of several
assignees cannot
be received,
unless it is
served upon the
other assignee.

Ex parte BRERETON.—In the matter of DOBSON.—

WHEN this petition was called on, the attestation to the signature appeared in this form: “A. B., writing clerk, Bridgenorth,” and it was only signed by one assignee.

Mr. *Glasse* objected to its being heard on two grounds:

1st. that it was not attested by the solicitor actually presenting the petition, or by any person stating himself in his attestation to be the attorney, solicitor, or agent of the party signing, in the matter of the petition, pursuant to the terms of the General Order (a); 2dly. that it was a petition purporting to be presented by the assignees under the fiat, and was only signed by one.

Mr. *Bacon*, *contrà*. There is no reason now for observing so strictly the Order as to the attestation of petitions. Before the Court of Review was established, there was no peculiar jurisdiction in bankruptcy over solicitors in general, unless they brought themselves within the jurisdiction; and the object of the Order was, that some particular solicitor should be made responsible to the Lord Chancellor sitting in bankruptcy in the matter of every petition. But since the establishment of this Court, the solicitors who practise in it are admitted as the officers of the Court, and are consequently liable to its immediate jurisdiction and control. Lord *Eldon's* Order therefore has now become useless.

V. C. KNIGHT BRUCE, C. J.—I cannot receive a petition signed by only one of several assignees. It must stand over, therefore, either that the other assignee may be served with the petition, or that it may be amended by adding his signature.

(a) 12th August 1809. See 2 Desc. B. L. 98.

Ex parte WILLIAM DOWE BUSHELL, and WILLIAM TOTHILL.—In the matter of DANIEL WADE ACRAMAN, WILLIAM EDWARD ACRAMAN, ALFRED JOHN ACRAMAN, WILLIAM MORGAN, THOMAS HOLROYD, and JAMES NORROWAY FRANKLYN.—

1844.

Westminster,
June 3, 4, 7,
and
Lincoln's Inn,
June 24.

THIS was the petition of assignees, for expunging a proof.

The three first named bankrupts, *D. W. Acraman*, *W. E. Acraman*, and *A. J. Acraman*, for several years carried on the business of merchants, in partnership, at Bristol, and also a separate business of iron masters or manufacturers there, under the firm of *Daniel, Edward*, and *Alfred Acraman*. They were also engaged with other persons in the importation and sale of tea to a large extent. *W. E. Acraman* was also a partner in the firm of *Briggs, Thurburn & Co.*, of London, merchants, which had also an establishment at Liverpool, where they traded under the firm of *Acraman, Briggs & Co.*

On the 1st October 1839, the three *Acramans* formed a separate and distinct partnership with *T. Holroyd* and *W. Morgan*, in the business of iron manufacturers and ship builders, under the firm of *Acramans, Morgan & Co.*, *Morgan* being the managing partner of this business, which was carried on at various works and manufactories in and near Bristol; but the money affairs and transactions, and the keeping of the accounts and books, were under the immediate superintendence of *W. E. Acraman* and *A. J. Acraman*, at the counting-house of the partnership in Bristol, and in the same building wherein the business of the three *Acramans* was carried on; *Holroyd*

Two of six partners, who had given a confidential clerk a general authority in writing to sign bills and notes on behalf of the firm, direct the clerk to sign four promissory notes, in the name of the firm, payable respectively to one or the other of the two partners, who claimed to be creditors of the aggregate firm, in respect of an excess of capital advanced by them for the purposes of the partnership. The two partners afterwards indorse the notes to a separate creditor, for a private debt of one of the two. Held, that although, as between these two partners and the other members of the firm, the notes were unjustifiably created and possessed by the two, yet, in the absence of all fraud or connivance in the

transaction by the party to whom the notes were indorsed, the firm of the six were liable for the amount, and that, on the bankruptcy of the firm, the holder of the notes had a right to prove the amount of them against the joint estate.

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being a sleeping partner, and *W. D. Acraman*, who was a person of very advanced age, also taking no active part in the business. After the formation of this partnership, namely, on the 31st December 1840, the several parties executed regular articles of partnership, by which the partnership was to continue for the term of ten years from the 31st December 1839, the three *Acramans* being each entitled to four eighteenth, and *Holroyd* and *Morgan* each to three eighteenth shares. The capital was to consist of 90,000*l.* in the following proportions, namely, 20,000*l.* contributed by each of the *Acramans*, making 60,000*l.*; 20,000*l.* contributed by *Holroyd*, and 10,000*l.* engaged to be paid by *Holroyd* and *Morgan*, so as to make up their respective portions of 15,000*l.* each of the capital. Among other stipulations in these articles were the following, viz. that any money advanced by any of the partners beyond his proportion of capital should be deemed a debt from the partnership, but if the partner making the advance should require the same to be paid, or any of the other partners should require the same to be taken out of the partnership, it should then be repaid or taken out, with interest at 5*l.* per cent., at the expiration of six calendar months next after such requisition; but if he should refuse or neglect to take out the same, all interest should thenceforth cease. And that no partner should, without the consent of the others, discount any bill or note with partnership money or effects, nor apply or dispose of any of the partnership money, bills, notes, securities, or other effects, in any other manner than in the usual course of the business of the partnership.

It appeared that *G. Morgan*, the brother of the bankrupt *W. Morgan*, was employed by the firm to conduct

their commercial correspondence, and for that purpose was authorised by them to sign bills of exchange and cheques in the name of the firm, under the following procuration :

“ Bristol Iron Works, 11th June 1840.

“ Dear Sir,—We hereby have to request, and we do hereby likewise authorise, you to sign all letters, acceptances, bills of exchange, drafts, cheques, or other matters incidental to the management of our commercial departments, or ancillary thereto, on our behalf, and by procuration of our firm.

Yours,

Acramans, Morgan & Co.”

On the 11th August 1841, the bankrupt *J. N. Franklyn* was admitted a partner in the firm, when certain additional articles of partnership were signed by the several partners, which recited that *W. E. Acraman* and *A. J. Acraman* had advanced large sums to the partnership, in addition to their shares of the capital, which then remained due to them ; and that the partners were desirous of increasing the capital of the partnership, so as that it should not exceed 250,000*l.* in the whole, and for that purpose of admitting new partners therein, and had agreed that the capital should be held in shares of 5000*l.* each ; and that *W. E. Acraman* and *A. J. Acraman* had agreed to increase their proportions of the capital from the sum of 20,000*l.* to the sum of 40,000*l.* each. It was then provided and declared that the other persons, whose names were then, and were intended to be, thereunder written, should be admitted as partners, and that they, and the parties to the former articles of partnership, should be and continue partners on the terms of those articles ; that each of the parties should be entitled to the number of 5000*l.* shares set opposite

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to his name; that each of the new partners would pay the sum of 5000*l.* for each of his shares on or before the 31st December then next, and should be entitled to interest on the sums paid, at the rate of 5*l.* per cent. These additional articles were signed by

D. W. Acraman, for . . . 4 shares,
W. E. Acraman, . . . 8 shares,
A. J. Acraman, . . . 8 shares,
T. Holroyd, . . . 4 shares,
W. Morgan, . . . 2 shares,
J. N. Franklyn, . . . 3 shares.

In September 1841, *W. E. Acraman* and *A. J. Acraman* directed *G. Morgan* to sign a large number of promissory notes, in the name of the firm of *Acraman, Morgan & Co.*, payable, as to part, to *W. E. Acraman*, and as other part, to *A. J. Acraman*, or their respective orders, for sums amounting in the whole to the sum of 84,272*l.* 8*s.* 4*d.*, which was alleged to be the amount then due from the firm of *Acramans, Morgan & Co.*, in respect of advances made by *W. E. Acraman* and *A. J. Acraman*, and which had been entered in the partnership books by the direction of the two *Acramans*, to the credit of a loan account with the firm of *D., E. and A. Acraman*. In pursuance of the above directions, the promissory notes were written or filled up by a book-keeper, who was in the employment of both the firms, and who acted under the immediate orders of the two *Acramans*, and the notes were afterwards signed by *G. Morgan*, without the knowledge of any of the other partners. The notes, which were 160 in number, were signed on the 14th September, the 25th April, the 28th September, and the 30th September 1841, and were then taken possession of and kept by *W. E. Acraman*

and *A. J. Acraman*, and by their direction were entered in the books of the firm of *Acramans, Morgan & Co.*, to the debit of the firm of *D., E. and A. Acraman*; but such entry was alleged to have been made, without the knowledge or sanction of the other partners, and never to have been since adopted or recognized by them.

Among the above mentioned promissory notes were the four following: one for 2500*l.*, dated the 7th May 1841, and payable twelve months after date to *W. E. Acraman* or order; another for 5000*l.*, dated the 20th May 1841, and payable twelve months after date to *A. J. Acraman*, or order; another for 1500*l.*, dated the 23d August 1841, and payable nine months after date to *A. J. Acraman*, or order; and another for 1000*l.*, dated the 27th August 1841, and payable nine months after date to *A. J. Acraman*, or order.

It appeared that *Hulbert, Layton & Co.*, of London had been for several years employed by the firm of *D., E. and A. Acraman*, as their brokers, in their business connected with the importation and sale of teas, and that they had also been employed by *A. J. Acraman*, on his own private account, in certain speculations or time bargains in the purchase of teas, which speculations had been unsuccessful; and he had become indebted to *Hulbert, Layton & Co.*, on his private account, in a large sum of money. In November 1841, *W. E. Acraman* and *A. J. Acraman* indorsed the four promissory notes above mentioned, which were then delivered by *A. J. Acraman*, in satisfaction of his private debt, to *J. Layton*, on behalf of the firm of *Hulbert, Layton & Co.*

It was alleged, that it appeared upon the face of the two first mentioned promissory notes, that, notwithstanding they purported to bear date in May 1841, they were

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written on stamps which were impressed with the date of the 21st September 1841, and that the two other notes were written on stamps which were impressed with the date of the 30th September 1841; that the stamps were not issued before the dates which were thus impressed on them; and that neither *J. Layton*, nor any of his partners, ever made any inquiry of any of the other partners of *Acramans, Morgan & Co.*, as to the supposed authority of *G. Morgan* to sign or make notes in the name, or by the procuration, of the firm of *Acramans, Morgan & Co.*, nor as to the purpose for which such promissory notes had been made, nor whether or not they had been so made by the authority, or with the knowledge, of any of the other members of that firm.

It was also alleged, that the before mentioned authority of the 11th June 1840, given by the firm of *Acramans, Morgan & Co.* to *G. Morgan* to make or sign promissory notes, was confined solely to such promissory notes, as it might be proper or necessary to draw or sign in the regular and usual course of the commercial dealings of that firm, and that the authority was not revived, after *Franklyn* became a partner in the firm; that when the notes were taken by *Layton*, he well knew that *Franklyn* had become a partner; and that neither of the other partners of *Acramans, Morgan & Co.* ever recognized any authority in *G. Morgan* to draw, make, or sign the above mentioned promissory notes.

It appeared that on the 30th September 1841, after the notes had been signed by *G. Morgan*, the fact was communicated by him to *W. Morgan*, who thereupon acquainted *Holroyd* with the circumstance, and that these two, accompanied by *Franklyn*, had then an interview on the subject with *W. E. Acraman* early in the

month of October 1841, and remonstrated with him upon the impropriety of the transaction, *Holroyd* at the same time delivering to *W. E. Acraman* a written protest against the notes being put in circulation, and requiring that they should be delivered up; when the latter promised that he would not part with or attempt to circulate them. On the 16th of December 1841, *Holroyd*, having heard that *W. E. Acraman* had not kept his promise, went to his house, accompanied by *Franklyn*, and there saw him in the presence of *A. J. Acraman*, when *Holroyd* and *Franklyn* insisted upon the notes being delivered up to be cancelled; upon which *W. E. Acraman* consented to give up all that were then in his possession; and he and *A. J. Acraman* finally produced 156 notes, which had been drawn for sums amounting in the whole to 71,522*l.* 8*s.* 4*d.* and delivered them up to *Holroyd*, who thereupon cancelled them.

On the 16th June 1842, the fiat issued against all the bankrupts; and *Layton* then applied to prove in respect of the four notes before mentioned to have been delivered to him by *A. J. Acraman*; and, after several meetings and much discussion, the Commissioner admitted him to prove for the sum of 10,034*l.* for principal and interest due upon the notes.

The above statement was supported by the affidavit of *W. Morgan*.

It was also sworn by him in another affidavit, that when *G. Morgan* was appointed a clerk in the office of *Acramans, Morgan & Co.*, *W. E. Acraman* proposed that a general and full power of attorney should be given to him to enable him to act for the co-partnership, not only in carrying on the detail of the business, but also to enable him to exercise a discretion therein; but that it was opposed by

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T. Holroyd, and consequently abandoned. That it was then determined that a letter should be signed by the firm, authorising *G. Morgan* to sign in the name and by the procuration of the firm, in reference to routine transactions, instead of the more general power which *Holroyd* had objected to; and *W. Morgan* was accordingly requested to sketch the form of such a letter, which he did in the terms of the letter of the 11th June 1840; and that the sole purport and effect of such letter was to enable *G. Morgan* to sign all the business correspondence, and to transact the other routine business of the firm, and to draw and accept such bills and cheques as should be required in the ordinary course of the business; but that it was not intended he should be thereby authorised to sign or pledge the name, or engage the credit, of the firm in any transactions or business than such as would naturally fall within the scope of the duties of the head clerk of such a business as the firm were engaged in. That at the same time when such letter was signed, and for the sole purpose of facilitating the business, a copy of it was transmitted to *Miles, Harford & Co.*, the bankers of the firm, with instructions to pay all acceptances or drafts signed by *G. Morgan* in the name and on behalf of the firm.

It was also stated by him, in regard to his knowledge of the issue of the promissory notes, that late on the night of the 30th September 1841, he was informed by *G. Morgan*, that he had on that and on some preceding days in September, by direction of *W. E. Acraman*, signed certain promissory notes per procuration for *Acramans, Morgan & Co.*, which had been filled in by the cashier and bookkeeper *J. S. Hayward*, agreeably to a list which *Hayward* brought in from the neighbour-

ing office of *D. E.* and *A. Acraman*, made out in the handwriting of *A. J. Acraman*; and that some of these notes had been made payable to the order of *W. E. Acraman*, whilst others were made payable to the order of *A. J. Acraman*, and that they amounted together to the sum of 84,000*l.* and upwards, and were payable at sundry dates. That he was greatly surprised and alarmed by the communication, and expressed his regret that *G. Morgan* should have obeyed the directions so given to him; and, being unable to learn from *G. Morgan* the reason which *W. E. Acraman* had for the creation of the notes, he at once declared the transaction to be most injudicious and improper, if intended as a measure of finance on behalf of *Acramans, Morgan & Co.*, and totally illegal, if it was intended to devote the notes, or any portion of them, to the purposes of *D. E.* and *A. Acraman*. That, the same night, he sent off a servant to the residence of *T. Holroyd* to communicate the matter to him, and to request that he would forthwith communicate with *Franklyn* on the subject; and that he likewise wrote a note of dissent from the transaction to *W. E. Acraman*, which he dispatched on the following morning; and that, *Holroyd* being absent from home, he went to his residence on the Sunday following, when it was arranged between them that *Holroyd* should with *Franklyn* seek an interview with *W. E. Acraman*, in order to procure the cancellation or destruction of the notes.

It was further sworn by him in his second affidavit, that in the month of November 1841, a brother of *J. Layton* was in the service and employment of the firm of *D. E.* and *A. Acraman*, and that *J. Layton* himself had been in the habit of frequently attending at their warehouses at Bristol for the purpose of sampling, lotting and selling

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their teas, and that by this means, and by his connexion in business with their firm, *J. Layton* became well and intimately acquainted with the affairs of the *Acramans* in their several firms, and well knew the nature of the business of the firm of *Acramans, Morgan & Co.*, and that the same was a separate and distinct business from the other affairs in which the *Acramans* were respectively engaged; and that at the time when the promissory notes were received by *J. Layton*, he well knew that *Franklyn* had become a partner in the firm of *Acraman, Morgan & Co.* That, when the deponent and *Holroyd* were together in London in August 1841, the latter received a letter from *W. E. Acraman*, dated the 11th August, acquainting him that *Franklyn* had joined the firm of *Acramans, Morgan & Co.* on that day, and had signed articles, and *Holroyd* was requested by *W. E. Acraman* to acquaint his London partners *Briggs, Thurburn & Co.* of the fact; and that after *Holroyd* had been into their counting-house in the city for that purpose, *Holroyd* informed the deponent that he met there accidentally *J. Layton*, who heard the communication made by him to *Briggs, Thurburn & Co.*, and expressed himself much gratified at the circumstance, affording evidence of the stability of the firm by the junction of a man of *Franklyn's* reputation, he having been the Mayor of Bristol, and being held to be a person of considerable wealth.

In support of the proof, it was stated by *W. E. Acraman*, in an affidavit made by him, that by far the larger portion of the bills and cheques for payment of money issued by the firm of *Acramans, Morgan & Co.*, were signed by *G. Morgan* by procuration of the firm, and that the bankers of the firm had instructions to pay, and

did pay, all bills and cheques so signed. That the fact that *G. Morgan* signed bills by procuration of the firm was perfectly well known both in London and Bristol, and the bills so signed were as readily negotiated as if they had been signed by any of the partners. That, in such cases, it is quite unusual for persons engaged in commercial pursuits to ask, whether a person allowed to sign by procuration for a firm holds any written authority for such purpose, the permission so to sign being understood to be general, unless notice is given that it is intended to be restricted; and that it was not known to any person, except the partners in the firm of *Acramans Morgan & Co.* and *G. Morgan* himself, that any written authority was given to the latter to sign by procuration.

It was further stated by him, that, in the beginning of November 1841, the firm of *Acramans, Morgan & Co.* being greatly pressed for further capital, after negotiations in which *Holroyd* and *Franklyn* took part, an agreement was made by their house with *Miles, Harford & Co.* of Bristol, bankers, for the advance of a large sum upon various securities, including the warehouses belonging to himself and *A. J. Acraman*, the title deeds whereof were then in the hands of *Hulbert, Layton & Co.*, and subject to their equitable lien; that he went to London accompanied by *Holroyd* and *A. J. Acraman*, for the purpose of forwarding the above arrangement, and brought with him a great proportion of such of the promissory notes (which had been drawn by *G. Morgan* to the amount of 84,000*l.*) as were not then negotiated; that he and *A. J. Acraman* went to the counting-house of *Hulbert, Layton & Co.*, where they saw Mr. *Layton*, and a negotiation was then entered upon for the delivering up of the title deeds of the warehouses, and promissory

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notes for 10,000*l.*, which *Hulbert & Co.* held as a security for a debt of 15,000*l.* due to them from *D. E.* and *A. Acraman*, in consideration of being satisfied partly in cash, and partly by some bills held by the last-mentioned firm for sugars sold by them to their customers at Bristol and elsewhere. That he was then first informed by *Mr. Layton*, that *A. J. Acraman* was indebted to them in upwards of 10,000*l.*, being the result of an unsuccessful speculation in tea, and *Mr. Layton* declined to deliver up the deeds and notes, until he had some security for that debt, as well as the other. That he then offered, as security for such last-mentioned debt, to give *Hulbert, Layton & Co.* the promissory notes for 10,000*l.*, being part of those so drawn by *G. Morgan*, and being at longer dates than those held by them; to which proposal *Mr. Layton* ultimately agreed, and thereupon gave up to *W. E. Acraman* the title deeds, and also the promissory notes then held by his firm, upon receiving the four several promissory notes proved by *Hulbert & Co.* under the fiat; and that ultimately *Miles, Harford & Co.* advanced to *Acramans, Morgan & Co.* a large sum of money upon the security of various property, including the warehouses of *W. E. Acraman* and *A. J. Acraman*, the title deeds of which had been thus obtained from *Hulbert, Layton & Co.*

In his examination also before the Commissioner, it was deposed by *W. E. Acraman*, that, when the title deeds and notes were delivered up by *Mr. Layton*, the latter was aware of what partners constituted the firm of *Acramans, Morgan & Co.*; that in the month of October *W. E. Acraman* introduced *Franklyn*, as one of such partners, in *Layton's* office, and *Franklyn* at the same time stated something about his property.

In the examination of *G. Morgan* before the Commissioners, on the 1st August 1842, the following questions and answers, among others, were stated:—

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Q. Were you the person in the habit of inspecting the letters of the firm of *Acramans, Morgan & Co.*?

A. I was.

Q. Was there any other person authorised to write the letters of the firm?

A. To write, but not to sign them.

Q. Were you the only person authorised to sign letters?

A. I believe so; my authority was in writing under a procuration.

Q. Had you any other letter, or procuration, or authority in writing, besides the letter referred to?

A. Not to my recollection.

Q. Were you in the habit of signing bills in the name of *Acramans, Morgan & Co.*?

A. I was.

Q. Were you not also in the habit of drawing, accepting and indorsing bills, cheques, notes and drafts, in the name of *Acramans, Morgan & Co.*?

A. I was.

Q. Was that done under a written authority?

A. It was.

Q. Were there at any time, and if so, when, a debt due from *Acramans, Morgan & Co.* to *D. E. & A. Acraman*?

A. The books, I believe, so show a debt.

Q. Have you any reason to doubt the accuracy of these books?

A. None.

Q. Were all the partners in the firm, or any and

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which of them, aware at the time of your having signed the promissory notes in the name of the firm of *Acramans, Morgan & Co.*?

A. They were signed under the directions of *W. E. & A. J. Acraman*.

Q. Did either of the other partners know of it?

A. I believe not.

Q. Did you ever communicate the issue to the extent of 80,000*l.*, in the names of *Acramans, Morgan & Co.*, to the partners of that house?

A. I did; I mentioned it to the managing partner, *Mr. Morgan*, on the evening when the second and largest batch was signed, as far as my recollection goes.

Q. Did you ever mention it to *Mr. Holroyd*, or to *Mr. Franklyn*?

A. I did not.

Q. Whose act personally was the issue of the 80,000*l.* worth of bills of which you speak?

A. I believe that of *Mr. W. E. Acraman*; and it was not till after they were signed, that I had any communication with any other partner of the house of *Acramans, Morgan & Co.*

In an affidavit also of *G. Morgan*, he stated that the exclusive management and direction of the cash transactions, and of the entries in the books of the firm, was exercised solely by *W. E. Acraman* and *A. J. Acraman*, from the period when *G. Morgan* entered upon his office of chief clerk to the firm of *Acramans, Morgan & Co.* That the entries in the journal, ledger, or cash book, formed no part of his duties, but were confided to *J. S. Hayward*, the bookkeeper and cashier of the firm, under the immediate direction of *W. E. Acraman* and *A. J. Acraman*, and more particularly of the former.

That he, *G. Morgan*, signed most of the acceptances, cheques, drafts and letters for the firm of *Acramans, Morgan & Co.*, per procuration, but that he did so ministerially only; and that whenever the cashier informed him that further provision of funds was required, he referred him to *W. E. Acraman* and *A. J. Acraman*, and that he occasionally himself communicated to them the necessity of their making such provision; but that whenever he did so, it was by reason of the direction which they had taken as managing partners of the finance and of the books of the partnership. That in September 1841 he signed sundry batches of promissory notes, some payable to the order of *W. E. Acraman*, and others payable to the order of *A. J. Acraman*, to the amount in the aggregate of about 84,000*l.*; and that he signed them by the direction of *W. E. Acraman*, the notes having been filled in, in the handwriting of the cashier and bookkeeper, agreeably to a list made, as he believed to the best of his remembrance, in the handwriting of *A. J. Acraman*; and that he signed the notes by such direction alone, and without reference to any of the other partners, by reason of the direction which the *Acramans* had of the finances of the firm; that, when he was directed to sign them, *W. E. Acraman* told him that he required them for the purposes of the financial arrangements of the firm; and that he signed them, believing that it was proper for him so to do; but that *W. E. Acraman* subsequently told him, that he required them as vouchers of his and *A. J. Acraman's* advances, and that he had them drawn under the advice of his solicitor, as a precautionary measure; but that this last-mentioned communication was not made to him by *W. E. Acraman*, until some time after the notes had been signed.

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In the examination of *J. S. Hayward*, the bookkeeper and cashier of the firm of *Acramans, Morgan & Co.*, before the Commissioners on the 13th August 1842, he stated, that there were two accounts opened in the ledgers of the firm of *Acramans, Morgan & Co.* in account with the firm of *D. E. and A. Acraman*, one of them being a general trade account, and the other a loan account. That the credit side of the loan account consisted of cash and bills received from *D. E. and A. Acraman*, and that the debtor side consisted of cash payments, and also bills or notes of hand given to *D. E. and A. Acraman*. That bills, notes and cheques, signed or accepted by *G. Morgan*, were often cashed, taken up and honoured by the bankers of *Acramans, Morgan & Co.* That the bodies of the promissory notes for 84,272*l.* were filled up by *Hayward*, by the direction of *W. E. Acraman* and *A. J. Acraman*, without the knowledge of *Hobroyd, Franklyn*, or *W. Morgan*, and that the notes were all entered to the debit of *D. E. and A. Acraman* in the loan account, and also in the bill book, and that they exactly balanced the loan account. In his second examination he stated, that about 12,000*l.* of those notes were put into circulation; and that about the middle of December, the remainder of the notes to the amount of 71,622*l.* 8*s.* 4*d.* were cancelled by *Hobroyd*, who knew that the others had been put into circulation. That some of the notes were ante-dated; that two in particular, which were dated respectively the 7th and 20th May 1841, had a stamp on them of the 21st September in that year, and that two others dated on the 23rd and 27th of August 1841, had a stamp on them of the 30th September in that year, and that the notes themselves were drawn on the 25th and 30th September

1841. That the books of the firm were open to the inspection of any of the partners, and that most of the partners occasionally looked at the books, but Mr. *Morgan* very seldom.

In further support of the proof, it was stated in the affidavit of *J. Layton*, a partner in the firm of *Hulbert, Layton & Co.*, and also in his examination before the Commissioner, that in November 1841 there was a balance of 15,000*l.* due to his house from the firm of *D. E. and A. Acraman*, and also a sum of 10,000*l.* separately due from *A. J. Acraman*, for which they held the title deeds of a warehouse in Prince's Street as a security, and also some notes to the amount of 10,000*l.* drawn by *Acraman, Morgan & Co.* through *G. Morgan*; that they delivered up these securities to *W. E. Acraman*, on receiving from him other notes to the amount of 10,000*l.*, which had a longer time to run; that the deeds were exchanged for the 10,000*l.* worth of promissory notes, and that the debt of 15,000*l.* was satisfied by the payment of cash and sugar bills; that he made no inquiry whether the notes were given with the concurrence of *Hobroyd, W. Morgan*, and *Franklyn*, the other partners in the firm of *Acramans, Morgan & Co.*, being satisfied of the validity of the notes, from what was said by *W. E. Acraman*, who stated that the bills were given to him and *A. J. Acraman*, for excess of their capital. That he was informed by *W. E. Acraman*, that Messrs. *D. E. and A. Acraman* had made large advances to the amount of 84,000*l.*, or thereabouts, to *Acramans, Morgan & Co.* beyond their stipulated capital, and that they had made many applications for repayment, but that for want of better payment, they had taken the notes of *Acramans, Morgan & Co.* to that amount; and that both *W.*

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E. Acraman and *A. J. Acraman* were then, and, as he believed, still were persons in high credit as men of honour and integrity, and that he had no reason to doubt the accuracy of their statements; and that if he had any doubt respecting the credit of the notes, as against any of the parties thereto, he would not have parted with the title deeds, nor accepted such notes.

Mr. Swanston, and *Mr. Bacon*, in support of the petition.

The chief objection to the proof in this case is, that the notes of the six were given for the debt of the one. Our objection rests on four grounds.

1st. That the notes, which are signed for procuration of the firm of *Acramans, Morgan & Co.*, were drawn by the agent in excess of his authority.

2ndly. That the notes were never recognized by that firm.

3rdly. That the notes are not valid in the hands of Messrs. *Hulbert, Layton & Co.*

4thly. That the notes are not in a correct legal form, professing, as they do, to bind the six to one of the six.

As to the first point, we submit, that the authority of the 11th June 1840, which was given by *Acramans, Morgan & Co.* to *G. Morgan*, to sign bills and drafts incidental to the management of the commercial department of that firm, did not authorise him to draw bills or notes in the name of the firm, for the purpose of paying the private debt of *A. Acraman*. It is not in dispute, that the four notes in question were taken by *Hulbert, Layton & Co.*, in discharge of his private debt, and that this was not communicated to any member of the firm. We contend, that *G. Morgan*, who drew the

notes, was under the influence of *W. E. Acraman*, and that the conduct of the latter was most improper and illegal, in directing *G. Morgan* to sign notes to such an enormous amount, without any communication with the other partners of the firm. Moreover, the authority given to *G. Morgan* was given to him before the admission of *Franklyn*, as a partner, in the firm, and therefore *G. Morgan* had no power whatever to sign bills or notes that would be binding upon *Franklyn*.

With respect to the second point, that the notes were never recognized by the other partners of the firm of *Acramans, Morgan & Co.*, it is true that the notes, which had been drawn by *G. Morgan* for 84,000*l.*, were entered in the partnership books, but without the knowledge of *Franklyn, Holroyd*, or the other partners. There is no pretence for saying, that there was any recognition or acquiescence on the part of the firm in this act of the *Acramans*. The entry was the sole unauthorised act of *W. E. Acraman*, and was never recognized by the other members of the firm. They *might*, to be sure, have seen the entries, but there is no evidence that they ever did. And as to the four notes, which are the subject of the proof in this case, the 16th December 1841 was the first time that the other partners were aware that those notes had got into the hands of *Hulbert, Layton & Co.*

Thirdly, All the notes then being void in their creation, the four now in question are invalid in the hands of *Hulbert, Layton & Co.*, who were bound to ascertain whether *G. Morgan*, who drew the notes by procuration, had exceeded his authority. In *Attwood v. Mannings*(a), where *A. B.*, who carried on business on

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(a) 7 B. & C. 278.

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his own account, and also in partnership, gave a power of attorney, "for him and on his behalf, to accept bills drawn on him by his agents, or correspondents," and *C. D.*, one of *A. B.*'s partners, in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted in *A. B.*'s name, *by procuration*; it was held, in an action against *A. B.* by the holder of the bill, that the power of attorney applied only to *A. B.*'s individual, and not to his partnership, affairs; that the special power to accept extended only to bills drawn by an agent in that capacity; and that *C. D.* did not draw the bill in question as agent, but as partner, and that this constituted a good defence to the action. And it was there said, by Mr. Justice *Holroyd*, that the word *procuration* gave due notice to the plaintiffs; and that they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given.

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Mr. *Swanston*, and Mr. *Bacon*. In the present case, *G. Morgan*, who signed the notes by procuration, was a special agent, under a limited authority, to sign bills and notes relating to the commercial concerns of the firm of *Acramans, Morgan & Co.*; he could not therefore bind his principals by any act beyond the scope of such limited authority; *Fenn v. Harrison*(a). Nor had he any right to sign notes in the name of the firm, not for the purposes of the firm, but to answer the private purposes of the two *Acramans*. In *Green v. Deakin*(b), it was decided that one co-partner cannot bind another, by drawing a bill in the name of the firm for the discharge of his own private debt, without the knowledge of his co-partner; and that this defence might be set up by the latter in an action by the indorsee of the bill, without giving any notice of his intention to dispute the consideration. So in *Ex parte Bonbonus*(c), Lord *Eldon* said, that if it was manifest to a person advancing money to one of several partners, that it was upon his separate account, and so against good faith that he should pledge the partnership, the party to whom such pledge was given should show that the individual partner had authority to bind the partnership. In the prior case of *Ex parte Agace*(d), which occurred before the Lords Commissioners, it was decided that a partnership was bound by the acts of an individual partner in such cases, *only*, as in the usual course of dealing are referable to the partnership concerns; and Lord Commissioner *Ashurst* observed in that case, that, where a man takes a security from one partner in the name of a partnership, in a transaction

(a) 8 T. R. 757.

(b) 2 Star. 347.

(c) 8 Ves. 540.

(d) 2 Cox, 312.

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not in the usual course of dealing, he takes such a security at his peril.

In *Shirreff v. Wilks(a)*, also, it was held that two of three partners, who had contracted a debt prior to the admission of the third partner into the firm, could not bind him, without his assent, by accepting a bill drawn by the creditor upon the firm in their joint names; but that such security was fraudulent and void, as against the third partner, and that the amount could not be recovered in an action against the three. So, in the case of *Hope v. Cust*, which was cited by Mr. Justice *Lawrence* in giving his judgment in *Shirreff v. Wilks*, and which he read from the MS. notes of Mr. Justice *Buller*, the same doctrine was held by Lord *Mansfield* on a trial *nisi prius*. There Mr. *Fordyce*, who traded very largely in his separate capacity, as well as in the business of a broker in partnership with others, having considerable dealings in his private capacity with *Hope & Co.* in Holland, gave them a general guarantee, in the names of himself and partners, for the money due from him in his separate capacity; and Lord *Mansfield* told the jury, that the whole would turn on this, whether the taking the guarantee from *Fordyce* himself, in his own handwriting, without consulting the other partners, or having their privity, was not such gross negligence in the *Hopes* as would amount to a fraud or covin, and whether the circumstances of the case did not show that *Hope & Co.* had sufficient notice of the injustice and breach of trust, which *Fordyce* was guilty of in giving them such a guarantee. The doctrine laid down in the cases already cited was also recognized in *Ex parte Goulding(b)*, where it was held, that, if one partner gives the acceptance of the

(a) 1 East, 48.

(b) 2 G. & J. 118.

firm for his separate debt, without authority from his co-partner, such acceptance does not bind the firm. Here *W. E. Acraman*, in order to pay a private debt which his cousin had contracted with *Hulbert, Layton & Co.* for speculations in tea, hands over to them promissory notes of *Acramans, Morgan & Co.* to the amount of 10,000*l.* The other partners in that firm were under no obligation to give notice to *Hulbert & Co.* of their dissent, and their silence under these circumstances is not equivalent to a satisfaction of the transaction.

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Mr. *J. Russell*, Mr. *Wood*, and Mr. *Jenkins*, for the respondents. In the present case it is material to observe, that there were two separate firms, one of *D. E.* and *A. Acraman*, and the other of *Acramans, Morgan & Co.*; and the advances were made from the firm of *D. E.* and *A. Acraman*, to that of *Acramans, Morgan & Co.*, not from one partner to the firm, but from one distinct firm to the other; and there was a regular account current kept between the two firms.

The CHIEF JUDGE.—There are, as between the partners themselves, two questions, namely, whether the transaction of the creation of the promissory notes was regular on the part of the *Acramans*,—and whether it afterwards received the sanction of the other partners. As to the original creation of the notes, taken by itself, and considered as without the sanction of the other partners, *Holroyd, Franklyn*, and *William Morgan*, it seems difficult to maintain that it was justifiable.

Mr. *J. Russell*, Mr. *Wood*, and Mr. *Jenkins*. Regular entries were made in the books of account of the firm of

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Acramans, Morgan & Co., of the creation of these notes, in discharge of the debt due from that firm to the separate firm of the *Acramans*. These books were open to the inspection of any of the partners, and it is sworn that *Holroyd* and *Franklyn* did frequently inspect them, but *W. Morgan* not so often as the others. No dissent was expressed by them, until a considerable period after the entry of the notes, and not until after some of them had been negotiated. We submit, therefore, that the firm of *Acramans, Morgan & Co.* was liable for the amount of the notes, so negotiated, in the hands of a *bonâ fide* holder for valuable consideration. As to the case of *Ex parte Agace* (a), which has been cited by the other side, the consideration given for the bill in that case was the purchase of a bond by the partner, who gave the acceptances of the firm; a proceeding which was wholly distinct from any partnership transaction. And with respect to another case relied on, namely, that of *Ex parte Bonbonus* (b), Lord *Eldon* there expressly said, that, if the other partners were privy, and silent, permitting *Rogers*, the other partner, to go on dealing in the way there stated, by drawing bills in the partnership firm, without giving notice, the question would be, whether subsequent approbation was not for this purpose equivalent to previous consent. [The *Chief Judge*. Have you looked at the case of *Ridley v. Taylor* (c)? What Lord *Ellenborough* there says is very important.] There is a material fact which distinguishes this case from all those which have been cited; here the notes are signed, not by the partner giving the security, but by *G. Morgan*, the official organ of all the partners. *Ex*

(a) 2 Cox, 312.

(c) 13 East, 175.

(b) 8 Ves. 540,

parte Agace, and *Shirreff v. Wilks* (a), belong to a class of cases, where the party taking the security knew that the other partners could not be bound, without their sanction. But there is another class of cases, among which are *Ridley v. Taylor*, and *Swan v. Steel* (b), where the party taking the security has reason to believe, that the partner accepting or indorsing a bill in the partnership firm has authority to pledge the partnership credit, and deal with the partnership property. Our case is stronger than either of those last mentioned; for here the notes were signed by a party having full authority to bind the partnership firm, and were payable to an individual member of the firm.

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The CHIEF JUDGE.—There certainly may be a material distinction between the creation of a partnership liability, and a dealing with a partnership liability already created. There is said to be this feature in the present case,—that there was here the assertion of an acquisition of separate title by the partner dealing with the partnership security, and that the transaction was in the nature of a purchase.

The Counsel for the respondents in continuation. When the notes in this case were delivered to *Hulbert, Layton & Co.*, they had no reason whatever to doubt but that *W. E. Acraman* had full authority to negotiate them; and there is no evidence in the case imputing any *mala fides* to *Hulbert, Layton & Co.* In *Goodman v. Harvey* (c), it was held by the Court of Queen's Bench, that, in an action by the indorsee of a bill, who has given value for it, if his title be disputed on the ground that his indorser obtained the discount of the bill in fraud of

(a) 1 East, 48.

(b) 7 East, 210.

(c) 4 Ad. & E. 870.

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the right owner, the question for the jury is, whether the indorsee acted with good faith in taking the bill ; that the question, whether or not he was guilty of gross negligence, is improper ; and that although gross negligence may be evidence of *mala fides*, it is not equivalent to it. This is quite consistent with the doctrine previously laid down by Lord *Ellenborough* in *Swan v. Steele* (a), which applies very strongly to the present case. His Lordship there says : “ It would be strange and novel doctrine, to hold it necessary for a person receiving a bill of exchange, indorsed by one of several partners, to apply to each of the other partners to know whether he assented to such indorsement,—or otherwise, that it should be void. There is no doubt, that, in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners.” And he adds in another part of his judgment : “ The distinction is well settled, that, if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the partnership funds, knowing at the time that it is without the consent of the other partner, it is fraudulent and void ; but if it be taken *bonâ fide*, without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner in giving such security can disaffirm the act.” Now here *Hulbert & Co.* had every reason to believe, that the four notes in question were properly issued by the firm of *Acramans, Morgan & Co.* ; they were signed by *G. Morgan* on behalf of the firm, in the same way as all other bills and notes which were issued by the firm, and which were recognized in the commercial world as securities on which that firm was liable ; and it is expressly sworn by

(a) 7 East, 213.

W. Morgan, that the bankers, *Harford & Co.*, had orders from the firm to pay all drafts signed by *G. Morgan* by procurement of the firm.

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Mr. *Swanston*, in reply. I do not abandon the first point we insisted upon in this case, namely, that the notes were void in their origin, as being drawn by an agent who exceeded his authority. [The *Chief Judge*. There can be probably little, or no, question about the irregularity of the act, as between *W. E. Acraman* and some of his partners, or the right of the latter, as against him, to insist that all the notes in his possession, which were thus created, should be put into the fire.] The next question is, whether such an assent has been given by the partners to the circulation of these notes, as to give them a validity which they would not otherwise have acquired. It is evident, that the members of the firm, when they first heard of the creation of these notes, intended to deal leniently with *W. Acraman*, and gave him impliedly to understand that he might retain these notes, but not put them in circulation. On the 12th November an important transaction arises, namely, the negotiation of four of these notes, without the knowledge of the other partners, for the purpose of paying the private debt of *A. Acraman*. What passed on the interview which *W. Morgan*, *Holroyd* and *Franklyn* had with *W. E. Acraman* on the 6th or 7th of October, instead of being an assent, was an express dissent; and on the 16th of December, a large quantity of these notes was destroyed, on the urgent remonstrances of *Holroyd* and *Franklyn*. That certainly showed dissent on their part. The next question is, whether *Hulbert*, *Layton & Co.* were bound to make inquiries as to the authority of *G. Morgan* to draw

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the notes. Now certainly Mr. *Layton* had an opportunity of making any communication on the subject to *Holroyd*, who was in London, and who was frequently seen by *Layton* about the time the notes were negotiated. It is clear, therefore, that *Layton* took these notes, without any inquiry at all. He must have observed that the notes were antedated; this circumstance alone was quite sufficient to put him upon inquiry. The case of *Green v. Deakin* (a), which has been already cited, is precisely in point with this; there the property in the bill appeared, as in the present case, to be in the individual partner who negotiated it, the bill being made payable to him; and yet it was held, that he had no right to transfer it for his own debt. [The *Chief Judge*. Is *Green v. Deakin* more than a repetition of *Shirreff v. Wilks* (b)?] When a separate creditor thus endeavours to interfere with the rights of the joint creditors, it is not too much to require that he has done every thing to entitle himself to claim as a joint creditor. With respect to the imputed assent of the other partners to the negotiation of the notes,—it is clear, that there was no previous assent. Then, what is the subsequent assent? There must be a new contract, to show a subsequent assent; and there is no evidence of that. The form of the security cannot in any way affect the validity of the transaction. There are many points in our case, which should have put a prudent man upon his guard.

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V. C. KNIGHT BRUCE, C. J.—The question in this case is, whether a proof admitted against the joint estate of *D. W. Acraman*, *W. E. Acraman*, *A. J. Acraman*, *T. Holroyd*, *W. Morgan*, and *J. N. Franklyn*, the six

(a) 2 Star. 347.

(b) 1 East, 48.

bankrupts, ought, or ought not, to stand. The proof is upon four promissory notes, for sums amounting together to 10,000*l.*, of which the respondents, Messrs. *Hulbert, Layton & Co.*, assert, and the petitioners (the assignees under the fiat) deny, that the six bankrupts were by an agent the drawers, and that the respondents became the indorsees and holders, *bonâ fide*, for valuable consideration.

The material facts appear to be these: *D. W. Acraman*, the father of *W. E. Acraman*, and the uncle of *A. J. Acraman*, carried on the business of a merchant at Bristol, in partnership with those two gentlemen for several years before, and up to, the time of the bankruptcy, which took place in 1842. They were also engaged from some time in the year 1839, up to the bankruptcy, in a distinct house of trade at Bristol, under the firm of *Acramans, Morgan & Co.*, in partnership with other persons, neither of whom had any connection with the first mentioned house, which seems to have been much the older firm. It has been said, and perhaps correctly, that the three *Acramans*, though partners in the house of *Acramans, Morgan & Co.*, were so as individuals, and not as the persons composing the first mentioned house of trade. *D. W. Acraman*, being old and infirm, appears to have left all matters of business connected with the two houses of trade respectively to his son, either alone, or together with *A. J. Acraman*. The persons who, up to the 11th August 1841, composed the house of *Acramans, Morgan & Co.*, were the three *Acramans*, *W. Morgan*, and *T. Holroyd*, but on that day *J. N. Franklyn* became, and he thenceforth continued, a partner in that house with the other five gentlemen. This partnership of Mr. *Franklyn* was by the terms of

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its formation retrospective, that is, it was on the 11th August 1841 agreed between them, that he should be a participater in all the transactions of the firm of *Acramans, Morgan & Co.*, for the time past, from its commencement by the other five gentlemen, as well as for the future.

Messrs. *Acraman* made from time to time to the firm of *Acramans, Morgan & Co.*, chiefly or altogether before the 11th of August 1841, large advances beyond Messrs. *Acraman's* proper share of capital, so as to become in that sense considerable creditors of the firm of *Acramans, Morgan & Co.*; and for these, in that sense, the firm of the six became liable by means of the agreement of August 1841. The debt thus due to Messrs. *Acraman* amounted, at the commencement of September 1841, to more than 84,000*l.*, according to the books of the house of *Acramans, Morgan & Co.* The truth and accuracy of the books in this respect have not been substantially questioned, and may I think be trusted; nor is there reason to suppose, that, as between themselves, any account or investigation could have considerably or materially reduced or varied the amount. Upon the facts that I have mentioned, there seems no difference between the parties.

It has been suggested, that Mr. *Franklyn* considered, and alleged, that he had been misled in entering into the partnership, with regard to the extent of the means and liabilities of the house of *Acramans, Morgan & Co.* Whether he was so, I do not know. His present state of mental health appears to have prevented the possibility of examining him, or obtaining evidence from him. I may observe, however, that he does not appear to have ever disputed the fact, that he did become a partner in

the house on the terms that I have mentioned; nor would the materials before me justify me in inferring, that he had a case on which he was entitled to be relieved against the partnership, or against the agreement of August 1841. I cannot so infer.

*G. Morgan*, who was a brother of *W. Morgan*, and a confidential clerk in the service of the house of *Acramans, Morgan & Co.*, received from that house, in June 1840, the following written authority. (His Honour here read the authority given to *G. Morgan*, of the 11th June 1840(a)). This paper does not appear to have been communicated to the public; but *G. Morgan*, in fact, acted on behalf of the firm of *Acramans, Morgan & Co.*, in a manner which probably I cannot state better than by reading some passages from the evidence. (His Honour here read those parts of *W. Morgan's* affidavit which are stated *ante*, p. 621; that part of *G. Morgan's* examination before the Commissioners which is stated *ante*, p. 627; and those passages in the affidavit of *W. E. Acraman* which are stated *ante*, p. 624.) These portions of the evidence afford, I think, a view sufficiently accurate of Mr. *G. Morgan's* position, with respect to the firm; which is, however, further illustrated by some passages from his own affidavit, that I shall almost immediately read.

With this preliminary explanation, I now come to the transaction of creating the notes in question. The particular manner in which this is alleged by the petitioners, appears in *W. Morgan's* affidavit of February (already mentioned) in these words. (His Honour here read the passage in *W. Morgan's* affidavit, stated *ante*, p. 622, as to his knowledge of the issue of the promissory notes.) In the affidavit of *G. Morgan*, sworn on the 24th April

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last, and filed on behalf of the petitioners, are these passages : (His Honour here read the passages from *G. Morgan's* affidavit, as to the drawing of the promissory notes, *ante*, p. 629.) Mr. *Hayward*, a person to whom this affidavit refers, states in his examination of the 13th August 1842, thus : (His Honour here referred to that part of *Hayward's* examination, *ante*, p. 630, which related to his filling up the promissory notes.) The same person, Mr. *Hayward*, when examined again soon afterwards, says, among other things, thus : (His Honour here read that part of the second examination of *Hayward*, *ante*, p. 630, which related to the ante-dating of four of the notes.) These are the four notes in question; and the extracts from the evidence just read state fully, or at least sufficiently for the present purpose, the circumstances under which they were created, as they were in fact created, in September 1841, and possessed, as they were in fact possessed, in the same month, by Mr. *W. E. Acraman* and Mr. *A. J. Acraman*, or one of them; by which, or whether by both, is immaterial; for it is upon the whole case on both sides plain, that, in substance, all the acts of either of them, that are before the Court, must be taken as the acts of both, and as in effect sanctioned by Mr. *D. W. Acraman*.

A question was raised before the learned Commissioner, which has been scarcely, or not at all, raised before me,—the question, namely, whether, having regard to the dates of the four notes, of which, though they were all created in September, two are dated in May 1841, the words “*Acramans, Morgan & Co.*” written at the foot of them, as the style of the drawers, are to be considered as including, or not including, Mr. *Franklyn*, who, although by his agreement liable, as between the six members of

the house, for all its transactions of the whole years 1840 and 1841, did not become actually a partner, or so liable, until August 1841. I agree on this point with Mr. Serjt. *Stephen*. It is, I think, perfectly clear upon the evidence, that *G. Morgan* and *W. E. Acraman*, in creating the notes, intended, and always afterwards understood, the words to mean and to represent the firm of the six; that *Holroyd*, *Franklyn*, and *W. Morgan*, who all were aware, on or before the 7th October 1841, of the creation of the notes, uniformly understood them in the same way, and that the respondents and Mr. *A. J. Acraman* never understood them otherwise. With respect to Mr. *D. W. Acraman*, I repeat, that I consider him as identified with his son and nephew. It has not been, and I think could not successfully have been, contended for the petitioners, that *G. Morgan* had not, after the commencement of *Franklyn's* partnership in August 1841, the same power and authority to sign and act for the six, including *Franklyn*, as he had previously to sign and act for the five, not including *Franklyn*. I am of opinion, certainly, that if the four notes were originally, or became before the bankruptcy, available against *Holroyd* and *W. Morgan*, they also were originally, or became before the bankruptcy, available against Mr. *Franklyn*, and this, whether *G. Morgan* had, or had not (though probably in truth he had not), any power or authority, after the commencement in August 1841 of *Franklyn's* partnership, to sign the name of the firm, as a firm of five, to any new negotiable security. Then comes the question, whether, as between the *Acramans* on one side, and Messrs. *Franklyn*, *Holroyd*, and *W. Morgan*, on the other, these notes were justifiably created, and justifiably possessed by the *Acramans*. I think that they were not.

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Whatever the debt to the *Acramans*,—whatever their right, if they had the right, to insist on not being bound to give notice for payment,—they were not entitled to cause the creation, and obtain the possession, of the notes in September 1841, as they did, without the consent or knowledge, previous or contemporaneous, of Mr. *Holroyd*, Mr. *Franklyn*, or Mr. *W. Morgan*. That this was done with any dishonourable intention, or with any intention or wish of concealment on the part of either of the *Acramans*, I do not believe. But the transaction was, originally at least, one, in my opinion, not maintainable. It is a different question, whether the conduct of Messrs. *Holroyd*, *Franklyn*, and *W. Morgan*, after they had become aware, as early in October 1841 they did become aware, of the transaction of September, was such, as to set up, or to preclude them from disputing, the equitable validity against them of the notes,—and a different question, also, whether *G. Morgan* committed a breach of duty by signing the notes, in obedience to the order of *W. E. Acraman*,—upon neither of which questions do I at present say any thing. Assuming, for the present, that there was no such conduct on the part of *Franklyn*, *Holroyd*, and *W. Morgan*, as I have just mentioned, and assuming the badness of the equitable title of the *Acramans* to the notes, as against the firm of *Acramans, Morgan & Co.*, I proceed to the next stage of the facts, namely, the passing of the four notes in dispute, from the *Acramans* to the respondents, as the indorsees of the *Acramans*, under which title the proof was made and is defended.

Mr. *Layton*, and Mr. *W. E. Acraman*, were examined before the learned Commissioner, and have also made affidavits. Their examinations seem to me consistent in

all material respects with their affidavits, and not in any point to tend to discredit them. Mr. *Layton's* first affidavit is thus. [His Honour here read the passages from *Layton's* affidavit, as stated *ante*, p. 631.] Mr. *Layton's* second affidavit relates mainly, or exclusively, as the concluding passage of his first does, to a matter, I think, of immaterial controversy, namely, the time when first, after his firm had become the holders of the notes in question, there was notice to that firm that its title to the notes was, or would be, disputed. Without giving any opinion as to this controversy, I may say, that if Mr. *Layton* is in error as to it, that error does not, in my judgment, affect either his case or his credit. It is not, nor could reasonably be, contended, that, before the respondent's firm had become the indorsees and holders of the four notes, immediately the subject of the present contest, Mr. *Layton*, or his firm, was informed—the controversy is, when first afterwards, that is, whether afterwards, previously to the bankruptcy, Mr. *Layton*, or his firm, was informed—that Mr. *Holroyd*, Mr. *Franklyn*, or Mr. *W. Morgan*, meant to resist, or disputed or objected to, the notes. This controversy (deciding nothing upon it now) I assume, for the present, ought to be decided in favour of the petitioners. It does not, however, affect the question, whether the respondents became indorsees and holders *bonâ fide* for value, without notice. Subject only to this reservation, I am not aware of any ground for disputing the truth of any part of Mr. *Layton's* first affidavit; with which the examinations and affidavit of Mr. *W. E. Acraman* are consistent. That affidavit contains these passages. [His Honour here read the passages from *W. E. Acraman's* affidavit, as stated *ante*, p. 625.] I repeat, that I do not find in the

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case any materials rendering it in my judgment just or reasonable to disbelieve these statements; and neither side has asserted the inadmissibility of either of the affidavits or examinations before me, on the ground of interest. Did then the respondents become indorsees and holders of these notes, *bonâ fide*, for valuable consideration, without notice? That they became so *bonâ fide*, in the sense of not having acted either with any intent of aiding the *Acramans*, or either of them, in committing a fraud, or with any collusive, fraudulent, or dishonest intention, is to my mind perfectly clear. And it may be right towards Messrs. *Acraman* to add, in passing, (be the fact material or not material to the case before the Court), that, whether the conduct of Mr. *W. E. Acraman* and Mr. *Alfred Acraman* in this transaction was, or was not, erroneous between them and the firm of *Acramans, Morgan & Co.*, or any members of it, that conduct has not been, in my opinion, proved to have arisen from any unworthy motive, or to have been accompanied by any discreditable circumstances; and I say this, with a full recollection of Mr. *Holroyd's* affidavit, but with a recollection also of the other evidence.

Next comes the point of valuable consideration. This, I think, clearly established in the respondents' favour. The truth and justice of the debt due to them from *Alfred Acraman* have not been questioned; and assuming that they were, strictly, not entitled to insist on retaining, by way of security for it, the first parcel of notes, or the title deeds deposited, I do not see that I ought to assume the claim or suggestion, which they made of that right, to have been fraudulently or colourably made,—to have been made, if erroneously, not honestly,—or to have placed the two junior *Acramans* under any species of constructive



or equitable duress. This claim or suggestion, whichever it ought to be called, seems to have been readily acceded to; and accordingly the deposit in question takes place; which, by satisfying or removing that claim or suggestion, releases the title deeds. There is no ground for contending that this was not a transaction for valuable consideration.

But next, as to notice. This is not contended, on the petitioners' part, to have existed, except in this way;—namely, that it is insisted for them, that Mr. *Layton*, or his firm, had, before taking these notes, been made aware that *Franklyn's* partnership had not commenced in the month of May; which alleged circumstance, joined to the knowledge by Mr. *Layton* and his firm of the fact of the *Acramans* being members of the house of *Acramans, Morgan & Co.*,—to the nature of the stamps, and to the aspect and contents of the notes,—to the information stated by Mr. *Layton* and Mr. *W. E. Acraman* to have been received by Mr. *Layton* from Mr. *W. E. Acraman*, as to notes to so very large an amount having been drawn in that way,—and to the former deposit with Mr. *Layton* of the first parcel of notes for 10,000*l.*,—ought, as the petitioners contend, to have excited the suspicion of Mr. *Layton*, and to have put him on inquiry, and to be therefore held equivalent to notice. This contention deserves, and must receive, examination. And first, with regard to the evidence said to show that Mr. *Layton*, in November 1841, was aware of the time of the commencement of *Franklyn's* partnership. The whole is, I believe, this. Mr. *W. Morgan*, in his second affidavit, says [His Honour here read the passage from *W. Morgan's* affidavit, stated *ante*, p. 623, as to Mr. *Layton's* knowledge of *Franklyn* being a partner in the firm of

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Acramans, Morgan & Co.] And in one of Mr. *W. E. Acraman's* examinations there are these passages [His Honour here read the passages in *W. E. Acraman's* examination before the commissioner, the substance of which is stated *ante*, p. 626.] Mr. *W. E. Acraman* also in his affidavit has this expression, with respect to the interview of the 12th of November. [His Honour here read a passage from *W. E. Acraman's* affidavit, relative to his interview with Mr. *Layton*, as to the delivering up of the title-deeds, as stated *ante*, p. 625.] That there is no more evidence, as I believe there to be no more evidence, affirmative or negative, as to this point, is a circumstance, for which the absence of any opinion on either side that it was material to either side to show, when first the respondents' firm, or any member of it, was informed of the time of the commencement of *Franklyn's* partnership, would probably account. It seems to me, that such an absence of opinion probably existed; and although Mr. *Layton's* affidavits are silent on the point, yet it is one to which also the assignees have not examined him, and upon which Mr. *Holroyd's* affidavit says nothing. The observation, that Mr. *W. Morgan's* affidavit does not state his belief of the truth of the information, which he says was given to him by Mr. *Holroyd*, may be a slight one; perhaps no stress ought to be laid on it. But the notes were taken by Mr. *Layton*, on a day, which all parties have agreed in representing as having been the 12th of November 1841. Why was he to be bound to remember on that day information about the partnership received, if it was received at all, not with reference to that, or any such transaction, but casually in the preceding August? Neither from that information, if it was received,—nor from the general communication made to him by Mr.

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W. E. Acraman, in September or October of the same year,—nor from the conversation with *Mr. Layton* of the 12th of November, even if the articles of partnership of the 11th August are to be supposed to have been actually referred to in it,—ought there, in my judgment, to be drawn an inference,—and I cannot, from *Mr. Layton's* silence, or otherwise, infer,—that *Mr. Layton*, when he took the notes in question, did so, with notice that *Mr. Franklyn* was not in, or throughout, May a partner, or did so, under any obligation to inquire as to the time when he became a partner.

Next, as to the stamps, which are stamps of September. It was not, I believe, contended before the Commissioner, nor has it been contended before me, that either of the notes is unlawfully or insufficiently stamped, or that the mere legal validity of either of them is more, or less, by reason of the ante-dating. But it has been argued, that the stamps showed the notes to have been ante-dated, and that this was sufficient to put the respondents on inquiry. That *Mr. Layton*, when he took the notes, supposed them to be ante-dated, or actually observed the nature of the stamps, I cannot, after what he has sworn, believe. Still, however, it may possibly be, that he ought not to be allowed, for any effectual purpose, to say that he did not at the time see what the stamps were. Assuming, though without deciding, this to be so,—and assuming, but without deciding, that he must be taken to have known that a promissory note cannot (as, if I do not mistake, it cannot (a)) be stamped after it has

(a) By the 31 Geo. 3. c. 25. s. 19 (the provision of which is still in force by the 55 Geo. 3. c. 184, s. 8), the commissioners of stamps are prohibited from stamping any bill of exchange, promissory note, or other note, draft, or order, after it shall have been drawn or made, under any pretence whatever.—E. E. D.

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been made, yet, as I think the mere fact of a bill or note, which has several months to run when it is negotiated, being known to have been ante-dated, not for any purpose (with which I have now any concern) material, I cannot say that the knowledge of Mr. *Layton*, at the time, that the notes in question (which were all to fall due in May 1842) were ante-dated, was notice to him of any thing wrong or substantially irregular, or ought to have put him on inquiry.

Next, was there any thing incredible or improbable in the assertion made to Mr. *Layton*, as he states, by Mr. *W. E. Acraman*, as to advances to the extent of 84,000*l.* and upwards, or 84,000*l.*, or thereabouts, having been made by the *Acramans* to the house of *Acramans, Morgan & Co.*, beyond the *Acramans'* stipulated amount of capital,—and as to the *Acramans* having made application for repayment, and having, for want of better payment, taken the notes of *Acramans, Morgan & Co.* to that amount? I think not. Considering especially how the exact truth stood, I find it impossible to say that it was incumbent on Mr. *Layton* to disbelieve, to distrust, or to doubt, wholly, or to any extent, that assertion. It was, to a great extent, at least, true. I am of opinion, that he had a right to believe it; and I cannot, upon the evidence, hold that he did not believe it; nor do I think that it ought to have put him upon further inquiry. If so, Mr. *Layton* was justified in believing the *Acramans* entitled to dispose of the four notes at their pleasure for any purpose; and the only remaining question upon this part of the case must be, whether, as between the three *Acramans* themselves, the transaction ought to be taken as correct. I think that it ought; for I am, upon the whole evidence, satisfied, as I have I believe already

intimated, that every act of *W. E. Acraman* alone, or of him and *A. J. Acraman* jointly, in the case is to be considered, for every purpose, as effectually ratified and adopted by the three *Acramans*, either originally, or otherwise, before the bankruptcy; and that the transaction of the 12th of November was the joint and several act of *W. E. Acraman* and *A. J. Acraman*, on behalf of the three *Acramans*. I do not forget the circumstance, that a former parcel of the promissory notes was held by the respondents, or the silence, or slight degree of information, that there is as to that part of the case. Much of what I have said with regard to the second parcel, that namely now in question, is I think applicable to the first also. Considering this, and recollecting that the assignees have exercised their right of examining both Mr. *Layton* and Mr. *W. E. Acraman*, and might have examined persons who have not been examined, it would, I think, be unjust and wrong to form any conclusion, or draw any inference, unfavourable to the respondents' title to the second parcel, from the circumstance that they had held the first, or from any thing contained or omitted in the evidence as to the first.

These views, if they are, as they appear to me to be, right, free this case in my judgment, wholly from any operation adverse to the respondents of any part of the doctrine or principles, which the cases, *Ex parte Agace* (a), and *Ex parte Bonbonus* (b), and the case of *Sherriff v. Wilkes* (c), contain or recognize. Here not one of the notes was drawn or prepared in the presence, or with the knowledge, of the respondents, or either of them, actually or constructively. They are brought to them by the *Acramans*, as part of the property of the

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(a) 2 Cox. 312.

(b) 8 Ves. 540.

(c) 1 East, 48.

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Acramans themselves, who were capable of possessing, as their own distinct property, paper of the firm of *Acramans, Morgan & Co.*; nor can it be thought a thing strange or unusual, that, where *A.*, *B.* and *C.* are partners, *A.* should fairly and properly be the payee and holder for his own separate benefit of a bill or note drawn by *A.*, *B.* and *C.* The *Acramans* did not propose or affect to pledge, for their own debt or purposes, the responsibility of *Acramans, Morgan & Co.* farther, or otherwise, than as that responsibility was credibly and probably represented by the *Acramans* to have become the separate right of the *Acramans*. The handwriting of neither of them was upon the face of either of the notes; and all the notes, being partly printed, and partly written by *Hayward*, a clerk in the house of *Acramans, Morgan & Co.*, and signed on behalf, that is, by procuration, of that house by *G. Morgan*, also one of its clerks,—who was in the habit of signing negotiable securities for the firm, and part of whose business and duty it was to do so,—were exactly upon such paper, and exactly of such form and appearance, as they would have been, if they had been securities issued by the house in the most ordinary, regular, and unquestionably proper manner,—an observation which, being subject to the single qualification (if any), that two of the partners were severally the payees, is, in my judgment, subject to no material qualification whatever.

The case of *Green v. Deakin*(a) has, I think, been treated in the argument of the present case, as deciding more, and going farther, than I find myself able to collect that it does. I am not at all satisfied, that it is opposed to the view which I take of the present case. But if it

(a) 2 Star. 347.

is, I feel myself nevertheless bound to say, that the respondents became indorsees and holders of the four notes in question, *bonâ fide*, for valuable consideration, without notice of any infirmity in their indorsers' title.

In *Ridley v. Taylor* (a), where a bill, drawn by *Ord* and *Ewbank* upon *Taylor*, payable to the order of *Ord* and *Ewbank*, accepted by *Taylor*, and indorsed by *Ord* and *Ewbank*, was delivered by *Ewbank* to a separate creditor of *Ewbank*, in respect of *Ewbank's* separate debt, the transaction was held valid in the creditor's favour. Lord *Ellenborough*, in delivering the judgment of the Court, said, "This bill had an existence, according to its apparent date, eighteen days before the time of its delivery to the plaintiffs; it was drawn for a sum considerably exceeding the debt; and was not only drawn and indorsed, but accepted also, before it was produced to them; and although it is stated in the case, that in fact the bill was drawn and indorsed by *Ewbank* in the partnership firm, it does not appear that the plaintiffs knew that it was drawn and indorsed by *him*. Under these circumstances, it might reasonably be supposed by the party to whom it was given, to be a partnership security, of which *Ewbank*, the partner in possession of it, had for some valuable consideration, or in virtue of some arrangements with *Ord*, the other partner, become the proprietor, so as to be authorised to deal with it as his own. At any rate, the contrary does not either actually or presumptively appear." Similar remarks in substance may be applied here.

The subsequent case of *Gill v. Cubitt* (b) has for some years been considered as going too far, as throwing too great a burthen and risk on indorsees for value. The

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(a) 13 East, 175.

(b) 3 B. & C. 466.

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law, as now understood and administered, seems to me accurately laid down by Mr. Justice *Patteson* in *Backhouse v. Harrison*(a), where that eminent judge says "I have no hesitation in saying, that the doctrine first laid down in *Gill v. Cubitt*, and acted upon in other cases, that a party who takes a bill under circumstances, which ought to have excited the suspicion of a prudent man, cannot recover, has gone too far, and ought to be restricted. I can perfectly understand that a party, who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I never could understand, that a party, who takes a bill *bonâ fide*, but under the circumstances mentioned in *Gill v. Cubitt*, does not acquire a property in it. I think the fact found by the jury here, that the plaintiff took the bills *bonâ fide*, but under such circumstances that a reasonably cautious man would not have taken them, was no defence."

The late case of *Goodman v. Harvey*(b), as to gross negligence, cited at the bar, which is as strong as *Backhouse v. Harrison*, if not stronger, in the same direction, was recognized by the Court of Queen's Bench in *Uther v. Rich*(c), in 1839. It is unnecessary, therefore, to decide, whether the doctrine of *Gill v. Cubitt* would defeat the respondents' title; but I have no hesitation in stating my impression to be, that even that doctrine would not.

It has, however, been contended, that, assuming the respondents to have become *bonâ fide* holders of the notes for valuable consideration, without notice, they have no case, on the ground that, as it is said, the notes

(a) 5 B. & Adol. 1105.

(b) 4 Ad. & E. 870.

(c) 10 Ad. & E. 784.

were not in any sense the notes of the firm of *Acramans, Morgan & Co.*, by reason that, as it is said, they were not within the terms of the writing of procuration dated in June 1840, and by reason of the authority of the case of *Attwood v. Munnings(a)*, which case, as well as that of *Howard v. Baillie*, mentioned in it, and *Fenn v. Harrison(b)* in 3 and 4 Term Reports, I have examined, and also some others, particularly *Ex parte Sutton(c)*, *Smith v. Stanger(d)*, *Pickering v. Busk(e)*, *Gillman v. Robinson(f)*, *Todd v. Robinson(g)*, *Withington v. Herring(h)*, and *Prescott v. Flinn(i)*. Whether the notes were of the character described by the language of the paper of June 1840, and whether *George Morgan*, though directed by *W. E. Acraman* to sign them, acted wrongly in doing so, are points I think that I need not decide, and may leave undetermined. Assuming these two points to be in the petitioners' favour, I still must recollect that it has been in effect admitted, and I think rightly admitted, on each side, that *G. Morgan* had the same authority to act, and did act in the same manner, on behalf of the firm of *Acramans, Morgan & Co.* after, as before, *Franklyn* joined the house; I still must recollect, that *G. Morgan* signed the notes by the express direction of one or more of the partners composing the firm; that the notes were represented, passed, and delivered to the respondents, as notes of the firm by one or more of the partners composing the firm; that the notes are signed, "P. Procuration" generally, without stating or showing what the procuration was, or of what date,

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(a) 7 B. & C. 278.

(f) 1 Car. & P. 642.

(b) 3 T. R. 767; 4 T. R. 177.

(g) Ry. & M. 217.

(c) 2 Cox, 84.

(h) 3 Moore & P. 30; 5 Bing. 442.

(d) Peake's Add. Cases, 116.

(i) 9 Bing. 19.

(e) 15 East, 38.

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period, or nature, whether it was written or oral, or whether limited or restricted, or unlimited and unrestricted; that *George Morgan* was in the habit of signing negotiable securities in that way for the firm, with the knowledge and assent of the firm; that a considerable quantity of negotiable securities issued from their house, and was circulated among the public, in that form; that the affidavits which touch on this particular subject contain, with reference to it, the uncontradicted and undisputed averments which they do contain; that, in all probability, had it been considered to be incumbent on every person, before taking in the market or otherwise any such paper, to ascertain from the firm itself the propriety in each case, between *George Morgan* and his employers, the firm, of the affixing of his signature, their business and credit must have been obstructed and damaged considerably; that there is no trace in the evidence, as far as I am aware, of any such course or practice having existed or been expected; and that the public had no means of knowing, whether the paper of June 1840, or any written authority to *George Morgan*, existed, or what his orders, or the arrangements of the firm, were. Bearing all this in mind, I consider myself bound by law to hold, that in the circumstances of the present case the firm of *Acraman, Morgan & Co.* was, and the joint estate of the six bankrupts is, bound to the respondents as effectually by *G. Morgan's* signature to the four notes in question, as if it had been written in each instance under the personal direction, and by the personal order, of each one of the six members of the firm in September 1841.

These views, if they are correct, render it unnecessary to decide upon the nature and effect of the conduct of

Mr. *Franklyn*, Mr. *Holroyd*, and Mr. *William Morgan*, after they had become aware, (as previously to the 8th of October 1841 they all certainly were aware,) as well of the creation and existence of the notes, as of the grounds on which Mr. *W. E. Acraman* had obtained them from Mr. *G. Morgan*,—conduct, I mean, both before, and after, the respondents had become the holders of the four notes in question, and before, and after, that fact had become known, as in November or December 1841 it certainly had become known, to Mr. *Franklyn*, Mr. *Holroyd*, and Mr. *W. Morgan*. The whole of that conduct, however, taken together, appears to me to afford some, though in my opinion (as I have said) superfluous, evidence in support of the conclusion which I draw, as I have already stated, from the rest of the case. But, upon the question whether the evidence furnished by that conduct alone is, or would have been, sufficient to entitle the respondents to succeed in the present contention,—that is, whether, if the respondents had not, on the 12th of November 1841, acquired a perfectly good title to the four notes against the entire firm of *Acramans, Morgan & Co.*, the conduct of *Franklyn*, and *Holroyd*, and *Wm. Morgan*, after that day, was such as to preclude them from questioning the respondents' title, I need not, and I do not pronounce any judgment. My impression as to the rest of the case being such as I have stated, I cannot disturb the proof, but must dismiss the petition. The costs of both parties should, I think, be borne as to half by the joint estate of the six, and as to the other half, by the estate of the three *Acramans*.

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Westminster,
April 22.

Quære, whether a security, by way of conveyance to a trustee, on trust to sell and pay out of the proceeds the sum secured, is a legal mortgage within Lord Loughborough's Order.

Ex parte BARNETT.—In the matter of **ALLEN.**

THE petitioner claimed to be the legal mortgagee of a life interest of the bankrupt, and had obtained the Commissioner's Order for a sale. He now sought leave to bid.

The petition was opposed by the assignees on various grounds; and, on the deed creating the security being produced, it appeared to be a conveyance from the bankrupt to a trustee, on trust to sell, and out of the proceeds to pay a sum secured to a creditor, who was a party to the deed. The petitioner had taken an assignment of the creditor's interest.

Mr. Bacon for the petitioner.

Mr. Russell, for the assignees, referred to *Ex parte Petit (a)*.

V. C. KNIGHT BRUCE, C. J.—This is, in form, an ordinary petition for leave to bid at a sale directed to take place under Lord *Loughborough's* Order. The assignees consider the Order for sale erroneous, and contend, on various grounds, that the petitioner is not entitled to have the property sold. I doubt very much, whether a security in this form is within Lord *Loughborough's* Order; but even if it be, I think, under all the circumstances of the case, that I cannot make the Order sought, as the case now stands. If the petitioner desires an opportunity of bringing the case more fully before the Court, the matter may stand over for the petition to be amended.

The petition was ordered to stand over.

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Ex parte ROBERT HAYNES and JOHN KING, on behalf of themselves and the other Trustees of the Leicester Savings Bank.—In the matter of JOHN CLARKE, RICHARD MITCHELL, JOSEPH PHILIPS, and THOMAS SMITH.

Westminster,
May 6.

THE bankrupts had carried on business as bankers at Leicester, under the style of the Leicestershire Bank, and this was a petition for payment in full of a sum of 830*l.* 5*s.* 6*d.*, which they had received on account of the Leicestershire Savings' Bank, on the ground that it was money received by virtue of an office to which they were appointed in the bank. The legislative enactments on which the questions raised by the petition turned, were the 9 *Geo.* 4, c. 92, ss. 2, 3, 4, and 6; and 3 & 4 *Will.* 4, c. 14, s. 28 (a).

1. The 3 & 4 *Will.* 4, c. 14, s. 28, providing, that if any person thereafter to be appointed to an office in a savings' bank, and having money in his hands belonging to the bank, shall become bankrupt, the bank shall be paid in full, applies only to savings' banks which have conformed to 9 *Geo.* 4, c. 92.

(a) 9 *Geo.* 4, c. 92, sect. 2, "Be it enacted, that if any number of persons have formed or shall form any society, in any part of England or Ireland, for the purpose of establishing and maintaining any institution in the nature of a bank, to receive deposits of money, for the benefit of the persons depositing the same, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors, or administrators, at compound interest, and to return the whole or any part of such deposit and the produce thereof to the depositors, their executors or administrators (deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution), but deriving no benefit whatsoever from any such deposit, or the produce thereof, and shall be desirous of having the benefit of the provisions of this act; such persons shall cause the rules and regulations established or to be established for the management of such institution to be entered, deposited, and filed, in manner hereinafter directed, and thereupon shall be deemed to be entitled to and shall have the benefit of the provisions contained in this act: provided nevertheless, that no such institution to be hereafter formed shall have or be entitled to the benefit of the provisions in this act contained, unless the formation of the same shall have been sanctioned and

2. What is a sufficient compliance with 9 *Geo.* 4, c. 92, s. 6, providing that no savings' bank shall have the benefit of the act, unless its rules provide that no person, being treasurer, trustee, or manager of such institution, or having any control in the management thereof, shall derive any benefit from the deposits in the bank, except as in the act mentioned.

3. The certificate of the

barriester appointed under the provisions of 9 *Geo.* 4, c. 92, that the rules of a savings' bank are in conformity with the act, is not conclusive.

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HAYNES
and others.

The rules and regulations of the savings' bank were kept in a book, and had been transcribed upon parch-

approved of by the justices of the county, riding, division, or place where such institution is intended to be held, at the general quarter sessions, and by the Commissioners for the Reduction of the National Debt, or, on their behalf, by the comptroller general or assistant comptroller acting under the said commissioners."

Sect. 3. "And be it further enacted, that no such institution as aforesaid shall have the benefit of this act, unless the rules and regulations for the management thereof shall be entered in a book or books to be kept by an officer of such institution to be appointed for that purpose, and which book or books shall be open at all seasonable times for the inspection of the persons making deposits in the funds of such institution, and unless such rules and regulations shall be fairly transcribed on parchment, and such transcript deposited with the clerk of the peace for the county, riding, division, or place wherein such institution shall be established, which transcript shall be filed by such clerk of the peace with the rolls of the sessions of the peace in his custody, and a certificate of the enrolment thereof shall be signed by such clerk of the peace on a duplicate copy, to be provided by and returned to such institution."

Sect. 4. "And be it further enacted, that before a transcript of the rules and regulations, or alterations in or amendments of former rules or regulations, for the management of any institution requiring the benefit of this act, shall be deposited with the clerk of the peace for the county, riding, division, or place wherein such institution shall be established, pursuant to the directions of this act, such transcript shall be submitted by the trustees or managers for the time being of each respective institution, and at the expense of the said institution, to a barrister at law, to be appointed by the Commissioners for the Reduction of the National Debt, for the purpose of ascertaining whether the same are in conformity to law, and with the provisions of this act; and that the said barrister shall give a certificate thereof, or point out in what part or parts they are repugnant thereto; and the fee to be paid to such barrister for perusing the rules, regulations, alterations, or amendments of each respective institution and giving such certificate as aforesaid, shall not at any one time exceed the sum of one guinea, and such transcript shall be signed by two trustees, and shall, together with the certificate of such barrister as hereinbefore mentioned, be laid before the justices for such county, riding, division, or place, at the general or quarter sessions next after the time when such transcript shall have been so deposited; and it shall be lawful for such justices then and there present, after due examination thereof, to reject and disapprove of any part or parts thereof, or to allow and confirm the said transcript, or such part or parts thereof as shall be conformable to the true intent and meaning of this act,

ment, and submitted to Mr. *Tidd Pratt*, the barrister appointed by the Commissioners for the Reduction of

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without requiring the certificate or approval of any other barrister: provided always, that the said justices shall signify such rejection or disapproval of any one or more of the rules, orders, and regulations contained in such transcript, by the words 'rejected,' or 'disapproved,' written opposite such rule or rules, order or orders, regulation or regulations, and signed by the chairman at such sessions; and such rule or rules, order or orders, regulation or regulations, as shall be so rejected or disapproved, shall not be in force from the time of such rejection or disapproval, any thing in this act, or in any such rules, orders, and regulations, to the contrary notwithstanding: provided always, that the said clerk of the peace do, within the space of ten days next after such rejection or disapproval, give notice thereof in writing to the two trustees of such institution, by whom the transcript of such rules, orders and regulations shall be signed as aforesaid: and provided always, that nothing herein contained shall be construed to require any rule making any alteration in the hours of attendance at any such institution as aforesaid to be laid before such barrister aforesaid previous to the enrolment thereof."

Sect. 6. "And be it further enacted, that no such institution as aforesaid shall have the benefit of this act, unless it shall be expressly provided by the rules and regulations for the management thereof that no person or persons, being treasurer, trustee, or manager of such institution, or having any control in the management thereof, shall derive any benefit from any deposit made in such institution, save only and except such salaries and allowances or other necessary expenses as shall, according to such rules and regulations, be provided for the charges of managing such institution, and for remuneration to officers employed in the management thereof, exclusive of the treasurer or treasurers, trustee or trustees, manager or managers, or other persons having direction in the management of such institution, who shall not directly or indirectly have any salary, allowance, profit, or benefit whatsoever therefrom, beyond their actual expenses for the purposes of such institution."

3 & 4 Will. 4, c. 14, s. 28. "And be it further enacted, that if any person already appointed under the provisions of the said act, made and passed in the ninth year of the reign of his late majesty King George the Fourth, or who may hereafter be appointed to any office in a savings' bank, or in a society established under this act, and being entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any monies or effects belonging to such savings' bank or society, or any deeds or securities relating to the same, shall die, or become a bankrupt or insolvent, or have any execution or attachment or other process issued against his lands, goods, chattels, or

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the National Debt, according to the provisions of the 9 Geo. 4, c. 92, and that Mr. *Tidd Pratt* had certified that the rules and regulations were in conformity to law and with the provisions of the act. The transcript had been then, in pursuance of the act, deposited with the clerk of the peace and enrolled.

The only rules and regulations relating to the liability of the officers of the bank were the following:—

“ 1. *Management*.—This bank is under the management of a president, vice-presidents, trustees, and not less than fifty other managers, none of whom shall derive any benefit whatsoever, directly or indirectly, from the deposits received, or the produce thereof. The secretary, with one or more of the managers, will attend to receive deposits and conduct the business every Saturday and Monday, from eleven o'clock till one.

“ 2. *Superintending Committee*.—A committee of not less than ten managers, three of whom form a quorum, is empowered to superintend, manage, and conduct the general business of this bank; to add to their number from among the managers; to fill up vacancies in their own body; and to appoint a treasurer, auditors, secretary, and other officers or servants. The proceedings of this

effects, or make any assignment thereof for the benefit of his creditors, his executors, administrators, or assignees, or other persons having legal right, or the sheriff or other officer executing such process, shall, within forty days after demand made by two of the trustees of the said savings' bank or society as aforesaid, deliver and pay over all monies and other things belonging to such savings' bank or society to such person as the said trustees shall appoint, and shall pay out of the estates, assets, or effects of such person all sums of money remaining due, which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid is paid over to the party issuing such process, and all such assets, lands, goods, chattels, estates, and effects shall be bound to the payment and discharge thereof accordingly.”

committee are to be regularly laid before the general meetings of the managers of the bank.

“3. *Elections*.—The superintending committee of managers is empowered to add to the number of managers until they amount to 120, exclusive of the president, vice-presidents, and trustees. And the managers, at a general meeting, are afterwards to fill up by ballot any vacancy of president, vice-president, trustees, or managers. Every treasurer, actuary, or cashier, who shall be intrusted with the receipt or custody of any sum of money belonging to this institution, and every officer or other person receiving any salary or allowance for his services from the funds of this institution, shall give good and sufficient security, pursuant to 9 *Geo.* 4, c. 92, s. 7. No trustee or manager shall be personally liable, except for his own acts and deeds, nor for any thing done by him in virtue of his office, except in cases of wilful neglect or default.”

On the 13th of June, 1839, a meeting of the managers of the bank was held, at which the bankrupts were appointed treasurers of the bank, in the room of *John Mansfield*, a former treasurer, who had died, and the following minute was entered and signed—“Proposed by Mr. *S. S. Bankart*, and seconded by Mr. *Raworth*, that the Leicestershire Banking Company be appointed treasurers: a ballot took place, and Messrs. *Clarke*, *Mitchell*, *Philips*, and *Smith* were declared duly elected.”

On entering upon the office of treasurers, the bankrupts duly executed a bond to the clerk of the peace for the payment over to the managers for the time being the sums which came to the hands of the bankrupts as treasurers.

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The bankrupts continued to act as treasurers up to their bankruptcy, when the sum claimed by the petitioners was due from them to the savings' bank. During the whole period, one of them, *John Clarke*, was also one of the managers of the bank. The bankrupts had not received any salary or profit as treasurers beyond the benefit arising from having the current balance in their hands until its investment according to the acts.

The claim had been made before the Commissioner, and had been disallowed by him.

Mr. Anderdon and *Mr. Metcalfe* in support of the petition.

Mr. Russell and *Mr. Kenneth Macaulay* for the assignees. This bank does not come within the provisions of the 3 & 4 *Will.* 4, c. 14, which, being an enactment giving a preference to a particular creditor, and, therefore, being an exception to the general intention of the bankrupt laws, is to be strictly construed. The rules do not provide that no person, being a treasurer, shall derive any benefit from any deposit, and as the bank has not, therefore, conformed to the provisions of the act, it is not entitled to priority over the other creditors (a).

Mr. Anderdon in reply. Although the act of *Will.* 4 is, as regards officers appointed *before* the passing of the act, restricted to those appointed in conformity with the former act, yet there is no such restriction in the branch of the clause applicable to officers appointed *after* the passing of the act. The section simply says, "if any one who may hereafter be appointed to any office in

(a) *Ex parte Ross*, 6 Ves. 802.

a savings' bank, and having in his hands or possession, by virtue of his said office or employment, any monies belonging to such savings' bank, shall become bankrupt," &c. Now every part of this requisition is fulfilled in the present case, and why should it be altered, by importing into it words which belong to a perfectly distinct branch of the provision? But, even if a Court could thus introduce a restrictive qualification into the act, which the legislature has not thought fit to insert, still the provisions of the act of the 9 *Geo. 4* have in substance been complied with, and in fact the question whether they have or not cannot be raised, as the certificate to that effect of the barrister appointed under that act is conclusive upon the point.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The petitioners claim a privilege against common right, and must therefore clearly bring themselves within the language of the enactments on which they rely, as entitling them to such a privilege. Now the act 3 & 4 *Will. 4*, c. 14, which is relied upon for that purpose, mentions at the very outset the act 9 *Geo. 4*, c. 92, and as both acts relate to the same subject, they must be construed together. Reading them together, it appears to have been the policy of the legislature to bring, by all means short of compulsion, all institutions of this description under the provisions of the 9 *Geo. 4*, c. 92, and to give no advantages to any society not bringing itself within those provisions. And I think that when the 28th section of the 3 & 4 *Will. 4*, c. 14, speaks of persons "who may hereafter be appointed to any office in a savings' bank," such an institution is meant as shall fall within the provisions of the act of the 9 *Geo. 4*, and that the inter-

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pretation of the clause should be the same as if the words "or who may hereafter be appointed" had immediately followed the words "already appointed." Indeed I am not sure that, according to the ordinary rules of grammar, such is not the import of the words as they stand.

Then the next question is, whether this institution has conformed to the 9 *Geo.* 4, c. 92. It is true that one of the bankrupts is a manager as well as one of the treasurers of the savings' bank, but it would be quite consistent with the rules that the treasurer should not be a manager, and then he would be an officer, with respect to whom there is no provision in the rules as to his not deriving any benefit from any deposit made in the institution. I am of opinion that, in this respect, the institution has not complied with the 9 *Geo.* 4, c. 92, s. 6.

It has been contended that the certificate of the barrister appointed under the act is conclusive as to this, but I think that the wording of the act would have been different, had such been the intention of the legislature. The petition must be dismissed, but without costs.

Ordered accordingly.



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Ex parte ZWILCHENBART and others.—In the matter of **JOHN MARSHALL**, and in the matter of **WILLIAM MARSHALL** and **HENRY RODGERS**.

THIS was the petition of the assignees under the former of the above bankruptcies, praying that they might be declared entitled to the proceeds of certain property, as having been in the reputed ownership of the bankrupt, *J. Marshall*, but which the respondents, the assignees of *W. Marshall* and *H. Rodgers*, claimed as being part of the assets of those bankrupts.

In December 1840, the bankrupts, *W. Marshall* and *H. Rodgers*, who carried on business as iron founders at Liverpool, made a composition with their creditors, which was carried into effect under the provisions of a deed dated December 1st, 1840, and made between the bankrupts, *W. Marshall* and *H. Rodgers*, of the first part; *W. Marshall* the elder, father of the bankrupt *W. Marshall*, and the bankrupt *J. Marshall*, (who was brother of the bankrupt *W. Marshall*,) of the second part; and the several persons and firms whose names and seals were thereunto subscribed, of the third part. The deed recited that the bankrupts, *W. Marshall* and *H. Rodgers*, were indebted to the several persons, parties thereto of the third part, in the several sums set opposite to their respective names, and that, being unable to pay the same in full, it had been proposed by them, and agreed to by the parties of the third part, that they should, in full satisfaction and discharge of the said several debts so respectively due to the said several parties thereto of the third part, pay to them the said several parties thereto of the third part respectively a composition of 10s. in the pound, on the amount of such

*Lincoln's Inn,
June 23 and 25.*

An assignment of all the property of traders, in consideration of the assignees giving promissory notes to the traders' creditors, held, not to be a sale within the principle of *Baxter v. Pritchard*, but an act of bankruptcy.

The possession taken under such a deed held to be incapable of creating reputed ownership within 6 Geo. 4, c. 16, s. 72, and, therefore, where both assignors and assignees became bankrupts, and the fiat against the assignees was issued first, held, that the question did not arise whether the assignees in bankruptcy of the assignors could be held, by relation, to have assented, before their appointment, to the assigned property being in the order and disposition of the assignees under the deed, in analogy to the principle of *Ex parte Thomas and Fox v. Fisher*.

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debts, by the instalments thereafter mentioned, and that the several parties thereto of the third part should thereupon give and execute to the bankrupts, *W. Marshall* and *H. Rodgers*, an effectual release and discharge from the said several debts; and that *W. Marshall* the elder and *J. Marshall* had agreed to enter into the covenants thereafter contained, for the purpose of better securing the due and punctual payment of the said instalments, on having such assignment as was thereafter contained executed to them. The deed also recited, that by an indenture of even date the leasehold hereditaments belonging to the copartnership of *Marshall* and *Rodgers* had been conveyed to *W. Marshall* the elder and *J. Marshall*. By the operative parts of the deed, *W. Marshall* the elder and *J. Marshall* jointly and severally covenanted to pay the several parties of the third part 10s. in the pound on their debts by two instalments; and the bankrupts, *W. Marshall* the elder and *H. Rodgers*, with the privity, consent and approbation of the parties of the third part, assigned to *W. Marshall* the elder and *J. Marshall*, their executors, administrators and assigns, all and singular the goods, wares and merchandize, stock in trade, fixtures, machinery, book and other debts, bonds, bills, notes and other securities for money, and all other goods, chattels and personal estate and effects of and belonging or due and owing to the bankrupts, *W. Marshall* and *H. Rodgers*, or either of them, as such copartners in trade, to hold the same unto the said *W. Marshall* the elder and *J. Marshall*, their executors, administrators and assigns, as their own proper goods, chattels and effects; and the deed contained a power of attorney in the usual form, authorising *W. Marshall* the elder and *J. Marshall*

to collect the debts due to the bankrupts *Marshall* and *Rodgers*; and the parties of the third part agreed to release *Marshall* and *Rodgers* from the debts due from them to those parties, on their being paid the composition agreed upon within one month from the 1st of October 1841.

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All the creditors of *Marshall* and *Rodgers*, except one Mr. *Vickers*, executed the deed, and took from *W. Marshall* the elder and *J. Marshall* joint and several promissory notes for the amount of the composition. The bankrupts, *Marshall* and *Rodgers*, then discontinued their business, and left Liverpool; and *J. Marshall* entered into and retained possession of the partnership goods until his bankruptcy. *W. Marshall* the elder died in February 1841. On the 3rd of June 1841, the fiat against *J. Marshall* issued, and under that fiat the creditors of *Marshall* and *Rodgers*, who had signed the deed, proved for the amount of their promissory notes, and received a dividend.

On the 16th of June 1841, the fiat against *Marshall* and *Rodgers* was sued out by Mr. *Vickers*, and the assignees under that fiat claimed the goods which had been assigned by the composition deed, on the ground that the execution of that instrument amounted to an act of bankruptcy. The assignees of *J. Marshall*, however, insisted on their right to retain the goods, and they were sold by arrangement and on the understanding that the proceeds should abide the decision of the question. In support of the petition it was sworn that Mr. *Vickers*, although he did not execute the composition deed, well knew that it had been executed by the creditors generally; that he resided at Sheffield, and was a friend of the family of Mr. *Rodgers*, and had not, on that account,

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executed the deed, and was indifferent as to the payment of his debt; that he well knew that the firm of *Marshall and Rodgers* was broken up, and that their business had been discontinued upon the execution of the composition deed, and that Mr. *Rodgers* had returned to Sheffield to reside with his family; that he did not make any claim against the firm of *Marshall and Rodgers*, or in any way demand payment of his bill either against the firm, or either of the partners, and that he consented to allow his name to be used by the other creditors of the firm as petitioning creditor.

On the part of the respondents, and for the purpose of showing that the composition deed amounted to an act of bankruptcy, it was sworn that the separate estate of the bankrupt *W. Marshall* consisted only of a share in a colliery, the value of which was not 10*l.*, and that the separate estate of the bankrupt *Rodgers* was not worth more than 85*l.*

Mr. *Bacon* and Mr. *Rolt* in support of the petition. In the first place, the composition deed does not amount to an act of bankruptcy, being a sale for value; and, in the next place, if it were an act of bankruptcy, still, at the time of *J. Marshall's* bankruptcy, the goods were in his reputed ownership, and passed under the fiat against him to the petitioners. A third ground on which the petitioners might rest their case is, that Mr. *Vickers* was cognizant of, and acquiesced in, the composition deed, and sued out the fiat merely as the instrument of the creditors, who, by signing the deed, had precluded themselves from taking that step, and that, consequently, the fiat, under which the respondents claim, is equitably invalid.

Upon the first point, as the assignment here was for so much money as was payable by the terms of the promissory notes, the case does not fall within the class of cases relating to voluntary deeds, but within those authorities which establish that, where the assignment is for value, fraudulent intention will not be inferred, but must be proved to have existed; *Baxter v. Pritchard* (a), *Rose v. Haycock* (b), *Ex parte Caskivall* (c). No attempt is made here to make out any such case.

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As to the second point, it will not be contended that the goods were not in *J. Marshall's* order and disposition at the time of his bankruptcy. [The *Chief Judge*. The only question seems to be as to the consent of the true owners.] That question is disposed of by the principle on which *Fox v. Fisher* (d) was decided, and which was acted upon by the Lord Chancellor in *Ex parte Thomas* (e). According to that principle, although the assignees of *Marshall* and *Rodgers* were not appointed till after *J. Marshall's* bankruptcy, still their consent to the goods remaining in the order and disposition of *J. Marshall* would be implied by relation to the act of bankruptcy. The principle is manifestly a just one, for if the assignees' title is to arise by relation, it is right that their consent should be implied by relation also; they represent creditors who might have previously interposed to put an end to the reputed ownership; and injustice would be done by adopting the doctrine of relation for one purpose and not for the other.

(a) 1 Ad. & Ell. 456.

(b) 1 Ad. & Ell. 460.

(c) 19 Ves. 234; and see *Bamford v. Baron*, 2 T. R. 594; *Marshall v. Barkum*, 4 B. & Ad. 508; *Tape v. Hockey*, 7 B. & C. 101.

(d) 3 B. & Ald. 135.

(e) 3 M. D. & D. 40.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I wish only to hear the counsel for the respondents upon the question whether the assignment amounted to an act of bankruptcy. Assuming it to be an act of bankruptcy, one question that has been argued has been whether the petitioning creditor has so acquiesced in the provisions of that deed as to be prevented from suing out a fiat founded upon it. Upon that question, I am of opinion that there is no evidence whatever in this case of any such acquiescence. The affidavits go to the facts of the petitioning creditor being indifferent as to the payment of his debt, and taking no part of any kind with reference to the deed, but not to his acceding to its provisions or in any manner acting under it. It appears to me that his debt was not gone, and that he was entitled to use all his remedies for the recovery of it, and among others that of suing out this fiat. Upon that part of the case I have no doubt. Another question which was discussed, is that as to order and disposition. I certainly have no intention of questioning the authority of *Fox v. Fisher* or of *Ex parte Thomas*. It is not necessary, if it would be right, for me to express any opinion upon those cases. I should consider probably the principle of the decision in *Fox v. Fisher*, which is adopted in *Ex parte Thomas*, binding upon this Court. But I do not consider that principle as extending to this case. I am of opinion that where possession is taken under a deed executed by a man, who, by executing it, commits an act of bankruptcy, and upon that act of bankruptcy a fiat issues, a possession so acquired, by a person having notice of and participating in the act of bankruptcy, cannot be a possession constituting him the ap-

parent owner with the consent of the true owner within the meaning of the 72nd section.

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Mr. *Swanston* and Mr. *Prior* for the respondents. There was, substantially, no separate property of either *Marshall* or *Rodgers*, and the composition deed was an assignment of all the joint property. As to the argument that the transaction was a sale for value, the principle of the case of *Baxter v. Pritchard* (a), which has been cited, and of *Dutton v. Morrison* (b), and the rest of the cases of that class, is,—that a conveyance by a trader of his property for immediate pecuniary consideration, without any special circumstances in the case, is not an act of bankruptcy, for this reason, viz. that it merely changes the nature of the property, and does not deprive the trader of the means of paying his debts, but rather enables him to pay them. But how does that principle apply to such a case as this, where not one shilling passed? A promissory note, which is a mere engagement to pay at a future day, cannot be a pecuniary consideration within the authority of the cases referred to. *Butcher v. Easthope* (c), *Hunter v. Mortimer* (d), and *Carr v. Burdiss* (e) are other authorities proceeding upon the same distinction. In the last of them Lord *Lyndhurst* says, “Suppose nothing to be previously due from a trader to parties about to advance him money, a mortgage to them of his whole effects would be valid; the effect of such transfer being only the substitution of one sort of property for another, viz. money for goods.”

(a) 1 Ad. & El. 456.

(d) 10 Barn & Cress. 44.

(b) 17 Ves. 198.

(e) 1 C. M. & R. 443; 5 Tyr. 136.

(c) 1 Doug. 274.

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Mr. *Bacon* in reply. There is no substantial difference between this case and the cases of *Baxter v. Pritchard* (a) and *Rose v. Haycock* (b). In the latter of these cases it was laid down that the sale itself could not be an act of bankruptcy, and that the case must go to the jury on the question of fraud. [The *Chief Judge*. But a most honest deed may, nevertheless, be an act of bankruptcy.] It can only be an act of bankruptcy as a fraudulent deed. [The *Chief Judge*. The word fraudulent has received long since, with reference to these questions, a particular signification, different from that in which it is ordinarily used.] Still that particular signification has only been hitherto extended to voluntary deeds. This is not an instrument of that description; though a man must sell for money, he may make terms for postponement of payment. Such a stipulation has never yet been held to be a badge of fraud, even in the technical sense of the word. Nor can the circumstance that the payment is to be made to creditors of the assignor, instead of to himself, make any difference.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—I must treat this fiat as a valid fiat, at least as far as all interested under it are concerned. Then the question is, what interest was intended to be transferred by the composition deed (assuming it to have been an act of bankruptcy), coupled with the contemporaneous deed relating to the leasehold property. I have considerable doubts whether it was the intention of the parties to the deed to assign the property for the absolute benefit of the assignees under the deed. That appears to me, upon the whole evidence, at least questionable. I

(a) 1 Ad. & El. 456.

(b) 1 Ad. & El. 460.

must take it as proved that the separate property of the assignors was little or nothing, and that the property assigned was the bulk or substantially the whole of the assignors' property.

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But it is said that, if the meaning of the transaction was, that *William Marshall* the father and *John Marshall* were, in consideration of giving the notes, to be the owners of the property, the transaction was not an act of bankruptcy, because it would be a sale, and *Rose v. Haycock* (a) and *Baxter v. Pritchard* (b) were referred to in support of that proposition. It is not necessary for me to intimate any opinion upon these cases. I assume them to be rightly decided, and assuming that, I find the sales there most materially different from that which has been called a sale in the present case. I am of opinion that this is not a sale, so as to bring the case within the principle on which *Baxter v. Pritchard* and *Rose v. Haycock* were decided, and that even if it was the intention of the parties that the assignees under the composition deed should take absolutely, still the execution of the deed was an act of bankruptcy, consistently with the doctrine of *Barter v. Pritchard* and *Rose v. Haycock*, it being an instrument disposing of all the joint property of traders, who had little or no separate property, for the purposes of a composition, which did not include all the creditors, and which is now questioned by a creditor who did not accede to it. I am of opinion also that the section respecting order and disposition does not apply, a conclusion which I think consistent with *Ex parte*

(a) 1 Ad. & El. 460.

(b) 1 Ad. & El. 456.

1844. *Thomas (a) and Fox v. Fisher (b).* The consequence is, that the fund must be treated as the estate of *Marshall and Rodgers*. The costs of both sides must come out of the fund in dispute.

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Ordered accordingly.

(a) 3 M. D. & D. 40.

(b) 3 B. & Ald. 135.

Lincoln's Inn,
June 26.

Ex parte JOHN and SIDNEY SMITH.—In the matter of
THOMAS FEAVER.

Where a petition was presented for the common equitable mortgagee's Order, supported by evidence that was not satisfactory to the Court, and the Court referred it to the Commissioner to inquire into the circumstances of the deposit, *held*, on the Commissioner finding in favour of the petitioner's claim, that the petitioner was entitled to the rents from the date of the Order of reference.

THIS was the petition of equitable mortgagees by deposit of title deeds, who upon a former petition had obtained a reference to the Commissioner as to their title. They now sought the usual Order, and to be declared entitled to the rents of the mortgaged premises from the date of the original order of reference.

The memorandum accompanying the deposit was in the following terms:

"Friday Street, January 1st, 1842.

"Messrs. J. & S. Smith.

"Gentlemen.—In consideration of your having accepted for our accommodation two bills as under, we herewith deposit for your security six wine warrants, an oil painting, and two leases of premises, No 2, Notting Hill Terrace, to be held by you till such bills are paid, and we hereby guarantee to provide you with the money for the payment of the said bills the day before they become due, and in default of our so doing, we authorise you to sell or otherwise dispose of the said wine warrants

picture and leases for whatsoever they will fetch, to reimburse you the amount of the said bills, with all expences, interest, and charges whatsoever.

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“ Your obedient servants,

“ *Feaver & Co.*

“ Bill for 227*l.* 18*s.*, dated 1st December 1841, at four months, due 4th April 1842; ditto 27*l.* 15*s.*, 1st January 1842, at 4th May 1842.”

By the former Order, dated February 2d 1844, it was referred to Mr. *Merivale*, the Commissioner acting in the prosecution of the fiat, to inquire and ascertain under what circumstances the five warrants, the two indentures of lease, and the oil painting, mentioned in the former petition, came into and were then in the possession of the petitioners; and whether the petitioners had any and what claim thereto, with liberty to state special circumstances, and liberty for the parties to apply, and costs were reserved. The Commissioner proceeded with the inquiry, and found that the warrants, the leases, and the picture, came into and were in the possession of the petitioners as a security, upon the terms contained in the memorandum set forth in the petition; and that the petitioners had a claim upon the said securities for the sum of 177*l.* 5*s.*

Mr. *Swanston*, in support of the petition, contended that the petitioners were entitled to the rents from the date of the former Order. In *Ex parte Bignold* (a), it was decided by Sir *J. Leach* that an equitable mortgagee was entitled to the produce of the mortgaged estate from the time of presenting his petition for a sale.

Mr. *Bacon* for the assignees. The petitioners can

(a) 2 G. & J. 273.

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have no claim to the rents, except from the date of the Order of sale; *Ex parte Alexander* (a), *Ex parte Bignold* (b). On the former occasion, he presented a petition, supported by insufficient evidence of his right to any Order for sale, and the Court referred the matter to the Commissioner for inquiry. He has only now proved his title as equitable mortgagee, and therefore cannot be adjudged to be entitled to the rents from the date of the first Order, which was not decisive as to his rights. It is a rule clearly established, that an equitable mortgagee cannot claim the rents until he obtains a positive declaration of the Court that he is an equitable mortgagee.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—A petition was presented by equitable mortgagees for the usual Order, and the evidence in support of their claim not being quite satisfactory in the first instance, the Court made an Order, not establishing their title, but referring it to the Commissioner to inquire whether they were justly entitled to claim a lien on the property in question as equitable mortgagees. The Commissioner has found them to be so entitled; and I am of opinion that it is consistent with the former Order, to hold now that the right of the petitioners to the rents attaches from the time when that Order was made, nor does such a holding appear to me inconsistent with any authority that has been cited, or of which I am aware, or with principle. The Order will be of the usual kind in other respects; the costs of the inquiry before the Commissioner must come out of the mortgaged property (c).

(a) 2 G. & J. 275.

(b) 2 M. & A. 16.

(c) See *Ex parte Bignold*, 2 D. & C. 398; *Ex parte Burrell*, 3 Dea. 76; *Ex parte Thorpe*, *ibid.* 85; *Ex parte Scott*, *ibid.* 304; *Ex parte Ramsbottom*, 4 D. & C. 198; *Ex parte Bignold*, 4 D. & C. 259.

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Ex parte CHARLOTTE GRIMSTEAD.—In the matter of

JAMES GIBBS.—

Lincoln's Inn,
June 26.

THIS was a petition for the appointment of a new trustee in the room of the bankrupt. On the hearing of the petition, on the 18th December last, an Order was made that the bankrupt should be removed from the trust, and that a new trustee should be appointed in his room; and as the assignees and the bankrupt had both been served with the petition, it was further ordered, that the costs of the bankrupt and assignees, occasioned by that application and of the assignment to the new trustee, should be paid to them respectively by the petitioner. It appeared that the bankrupt's costs were subsequently taxed by the officer of the Court at the sum of 20*l.* 5*s.* 2*d.*; and that when they were demanded of the petitioner's solicitor, he refused to pay them, on the ground of the official assignee having claimed to receive them from the petitioner, as the bankrupt had not obtained his certificate, nor even passed his last examination, which had been adjourned *sine die*. The bankrupt then served the petitioner's solicitor with a notice, requiring him to produce the above Order to the Registrar of this Court, for the purpose of having it marked by the Registrar with the day of the month and year on which it was passed, pursuant to the requisition contained in the late General Order of the 29th April 1844 (a), and preparatory to suing out a *feri facias* to levy the amount of the costs on the petitioner. The petitioner's solicitor, however, refused to produce the Order; upon which the bankrupt gave him notice of motion to the Court for an Order to compel him to pro-

A petitioner obtaining an Order of the Court for any purpose, which directs him to pay the costs of another party appearing on the petition, is bound, on the requisition of such party, to produce the Order to the Registrar, pursuant to the General Order of the 29th April 1844, for the purpose of his marking on it the date when it passed, preparatory to the issuing of a writ of *feri facias* for the amount of the costs.

(a) See *post*, Appendix, p. cxix.

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duce it to the Registrar for the abovementioned purpose.

Mr. *Swanston* appeared in support of the motion.

Mr. *Trower*, contra, submitted that the petitioner was not justified in paying over the amount of the costs to the bankrupt, when he had not obtained his certificate, and the money was claimed by the official assignee; and that as the marking of the Order was merely a preliminary step to enable the bankrupt to sue out execution for the costs, the petitioner was not bound to assist him in suing out process against herself.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—Whether the bankrupt is entitled or his assignees are entitled to these costs is a question with which the Court has nothing to do on the present occasion, and one on which I give no opinion. They may or may not be entitled to receive the amount. But the rules, which the Court has made for the regulation of its own practice, must be observed. Let the Order therefore be delivered *instantly* to the proper officer to be marked, pursuant to the terms of the General Order.

Mr. *Swanston*, upon this being done, applied for the costs of the present application, which was occasioned by the refusal of the petitioner to do an act which he was now positively required to perform.

THE CHIEF JUDGE.—This is quite a new case, being the first of the kind which has occurred since the promulgation of the General Order, I shall not send the

costs of this application to be taxed; but let the petitioner pay the bankrupt's costs of the present motion, not exceeding the sum of 3*l*.

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The matter came on again this day, on a motion by the bankrupt that the Registrar might deliver to him a writ of *fiery facias* to recover the amount of the above costs against the goods of the petitioner. The assignees had previously given notice to the petitioner not to pay the costs to the bankrupt.

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VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The costs in this case were incurred by the bankrupt as respondent in the character of a trustee. It was adjudged by an Order of this Court, in a matter in which the assignees were parties, that the costs of the bankrupt and the assignees, on the petition, should be paid to them respectively by the petitioner; and the assignees have never instituted any proceeding adverse to that Order, but have merely given notice to the party liable to pay these costs not to pay them to the bankrupt. These circumstances being combined, without entering into the general law on the subject, I think that I ought to allow the matter to take its course, and to permit the party to whom the costs were ordered to be paid to issue the writ of *fiery facias*. If the assignees choose to take any step as actors in any proceeding to recover the amount of these costs, they are at liberty to do so. All I now direct is, that the writ having been intercepted, the Registrar do issue the writ to the bankrupt, without prejudice to any right or claim of the assignees to the money when recovered.

With regard to the costs of this proceeding, the ques-

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tion was one which has been not unfairly brought before the Court; but I am of opinion, that the petitioner might, under an execution, have paid these costs, without being compelled to pay them over again. I do not think, therefore, that the party who originally created the difficulty ought to receive costs, or that the other party is bound to pay them; and I shall reserve the costs as between the assignees and the bankrupt.

Lincoln's Inn,
July 1.

An affidavit in support of the petition must not be sworn before the petition is presented.

In the matter of DICKSON.—

WHEN this petition was called on, the affidavit in support of it appeared to have been sworn before the petition was presented.

Mr. *F. Bayley* objected to the affidavit being read, and cited *Ex parte Northwood* (a). He also submitted, that the petitioner, having been guilty of an irregularity in this respect, must pay the costs of the day, and cited for this purpose *Ex parte Peel* (b).

VICE-CHANCELLOR KNIGHT BRUCE, C. J. allowed the objection, and ordered the petition to stand over for the purpose of re-swearing the affidavit; but that the costs should be reserved.

(a) 2 Rose, 246.

(b) Buck, 394.

Ex parte JULIA ANN SMYTH.—In the matter of
WILLIAM BROMLEY.

1844.

Lincoln's Inn,
July 1, 15, 16.
Aug. 3, 7.

THE petitioner in this case claimed to be entitled to an annuity and a policy of assurance in the Imperial Life Assurance Company, both of which the assignees insisted they had a right to retain, as having been in the reputed ownership of the bankrupt at the time of the bankruptcy. An incumbrancer upon the annuity also claimed an interest in it, in opposition and priority to the petitioner; and it had been agreed between all the claimants, that their respective rights should be decided upon the present petition. The circumstances of the case were as follows:

The bankrupt, who carried on an extensive practice as a solicitor in Gray's Inn, was the solicitor of the petitioner from the year 1818 till shortly before his bankruptcy. He had been in the habit of finding and recommending to the petitioner investments for her property, and of preparing the securities on which such property was from time to time invested accordingly. In and previously to the year 1842, the petitioner was entitled to a ground rent of 140*l.* per annum, which she had formerly purchased for 2650*l.* In May 1842 the bankrupt sent to the petitioner a letter to the following effect:

"Gray's Inn Square, May 4th 1842.

"My dear Madam.—My object in sending is to say I have an opportunity of changing your Church Street ground rent for an annuity, that will yield you about 20*l.*

A legatee, to whom an annuity is bequeathed for her life, grants an annuity for her life to A., to be issuing out of the bequeathed annuity, and afterwards grants another annuity for her life to B., to be also issuing out of the bequeathed annuity, which is insufficient to answer both the granted annuities. By a compromise of a suit respecting the priority of the charges, it is agreed that B.'s annuity shall have precedence, and that the residue of the bequeathed annuity shall be paid to A. A. then assigns his interest to a purchaser, describing it as the residue of the bequeathed annuity, after payment of B.'s annuity, and becomes bankrupt.

Held, that the assignment was merely equitable, and required, to complete it, notice to be given to the trustees of the will.

But it appearing that A. was the solicitor of the purchaser, and was trusted by her to do all that was proper for perfecting the purchase and assignment, and that he had not informed her that he was himself the vendor, *held*, that, although the proper notice of the assignment was not given, the annuity was not in the order and disposition of the bankrupt, with the consent of the true owner.

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a-year additional, with the benefit of a bonus on the insurance of the life; and I send, as I cannot keep it longer than this morning.—Yours, &c.

“*Wm. Bromley.*”

In consequence of the receipt of this letter, the petitioner called on the bankrupt, and was informed by him that the annuity was one of 209*l.*, and was part of an annuity of 300*l.* bequeathed by the late Lord *Stowell* to one *Jane Evans* during her life, and that it was charged upon Lord *Stowell's* personal estate and upon some ground rents in Cochrane Terrace of the value of 52*l.* 10*s.* *per annum*, and that, after deducting the premium on the insurance of *Jane Evans's* life, the value of the two securities would be about 166*l.* *per annum*. The petitioner consented to the proposed change of the investment of the 2650*l.*, and instructed the bankrupt to carry it into effect, and he undertook to do all that was necessary or proper for fully and perfectly effectuating the arrangement, and for vesting in the petitioner the annuity and the policy of assurance on the life of *Jane Evans*.

An assignment of the Church Street ground rents was soon afterwards prepared, and was brought to the petitioner by the bankrupt for her execution, and she executed it accordingly. Shortly afterwards the bankrupt gave her to understand, and she fully believed, that the security for conveying to and vesting in her the annuity and policy of assurance and the ground rents in Cochrane Terrace had been duly and properly completed and executed, and that all such acts as were in any manner required to complete and perfect such security had been fully performed by the bankrupt as her solicitor;

but the bankrupt never informed her that the annuity or policy belonged to himself, or that he was to be a party to the transaction, or explained to her that any notice would be necessary to be given for the purpose of perfecting the security, or preventing any subsequent purchaser or incumbrancer from acquiring a priority over the petitioner, but took upon himself the entire management of the transaction as the petitioner's solicitor, and was implicitly trusted by her to do all that was proper upon the occasion. Certain deeds were produced by the bankrupt to the petitioner, as constituting the security. They were, however, not examined by her. The bankrupt thereupon took them into his custody, as her solicitor, and no inquiry was made respecting them by the petitioner till the year 1844, when she heard rumours that the bankrupt was embarrassed in his circumstances, and, in consequence of such intelligence, she sent to the bankrupt the following letter:

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" Balham Hill, 4th Jan. 1844.

" Dear Sir.—I hereby authorise and empower you to deliver to my nephew Mr. *Chas. Pemberton* all deeds and securities for money in your hands or custody, to which I am in any way entitled; and for so doing this shall be your sufficient authority.

Julia A. Smyth."

" To *William Bromley*, Esquire."

On the same day, and subsequently on several occasions, the deeds were demanded from the bankrupt on behalf of the petitioner, who offered to discharge what (if any thing) the bankrupt claimed to be due from her to him; there being, however, nothing due, the bankrupt being, on the contrary, indebted to the petitioner, on the balance of accounts between them, in respect of monies

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received by him on her account. On the 8th of January the petitioner's then solicitor took out a summons to enforce the delivery of the papers, but the bankrupt had, on the 6th of January, signed a declaration of insolvency, for the purpose of becoming a bankrupt. The fiat issued on the 26th of January, when it turned out that all the deeds and papers relating to the annuities and policy of assurance had been deposited in August 1843 with one Mr. *George Barker*, along with other deeds, as a security for an advance of 3000*l.* made by him to the bankrupt. It appeared also that the title to the annuity was derived under a codicil to the will of Lord *Stowell*, which was dated March 1816, was duly attested by two witnesses, and was in the following terms :

" I give and bequeath unto the said *Jane Evans* one annuity or clear yearly sum of 300*l.* of lawful money of Great Britain to and for her own use and benefit, to be paid her by four equal quarterly payments, to commence from the day of my death, for and during the term of her natural life ; and I charge all my estate, real and personal, with the payment of the same."

It further appeared that on the 6th October 1825 the bankrupt purchased from *Jane Evans* an annuity of 190*l.* for her life, to be issuing out of the annuity of 300*l.*, and by a deed of that date *Jane Evans* granted to the bankrupt the said annuity of 190*l.* On the 2d of January 1825 the bankrupt purchased from *Jane Evans* a further annuity of 99*l.* for her life, to be issuing out of the annuity of 300*l.*, and by a deed of that date she granted to the bankrupt the said annuity of 99*l.* On September 28th 1827, *Jane Evans* granted out of the said annuity of 300*l.* an annuity of 91*l.* to one Mr. *Birchenall*. In 1839 a bill in Chancery was filed by the bankrupt

against the executors of Lord *Stowell*, *Jane Evans* and Mr. *Birchenall*, for the purpose, among others, of settling the priorities of the annuities. In this suit, the executors admitted assets for payment of the annuity of 300*l*. The suit was afterwards settled by an agreement, according to the terms of which the annuity of 91*l*. was to be payable in the first instance, and the residue of the annuity of 300*l*. was to be paid to the bankrupt. The sale of the annuity and policy to the petitioner was effected by a deed, dated February 25th 1843, and made between the bankrupt of the one part and the petitioner of the other part, whereby it was witnessed that the bankrupt bargained, sold, assigned, transferred and set over unto the petitioner all that the said annuity or yearly sum of 209*l*., being the residue of the said annuity of 300*l*., after deducting thereout the said annuity of 91*l*. payable to the representatives of the said *J. Birchenall*, and also the said policy of assurance, and all monies payable or recoverable in respect thereof. No notice of this assignment, however, had been given; whereas it appeared that Mr. *G. Barker* had given notice, in December 1843, to the solicitors of Lord *Stowell's* executors, and to the insurance office, of the deposit made with him by the bankrupt of the deeds and papers relating to the annuity and insurance. The prayer of the petition was for a declaration that the petitioner was entitled to the annuity and policy, and that she was entitled to the annuity as against and in priority to Mr. *G. Barker*; or that if the Court should be of opinion that Mr. *Barker* was entitled to the policy or the annuity, in priority to the petitioner, then that it might be declared that the petitioner was entitled to have the same, and

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the other securities deposited with Mr. *Barker*, marshalled, so that Mr. *Barker* should resort, in the first place, to the other securities; and that (if necessary) the property comprised in the deposited deeds might be sold, and the proceeds applied according to the rights of the several parties.

Mr. *Russell* and Mr. *Follett* in support of the petition.

Mr. *Wigram* and Mr. *Goodeve* for Mr. *G. Barker*.

Mr. *Swanston* and Mr. *Palmer* for the assignees.

On behalf of the petitioners it was argued, *first*, that the assignment of the annuity by the bankrupt to the petitioner was effectual at law, and did not require notice to be given to complete the title; *secondly*, that if notice was required, the petitioner was not a consenting party to its being withheld, having trusted to the bankrupt to do all that was necessary to make the assignment to her effectual; and that consequently the consent of the true owner was wanting to the property being in the bankrupt's order and disposition.

The following authorities were referred to: Co. Litt. by Butler, 144 b, note 236; *Webb v. Jiggs* (a); *Savery v. Dyer* (b); *Buckeridge v. Ingham* (c); *Turner v. Turner* (d); *Deeks v. Strutt* (e).

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The CHIEF JUDGE was of opinion that the title was equitable only, and required notice; but that, as the

(a) 4 M. & S. 113.

(b) Amb. 169.

(c) 2 Ves. jun. 651.

(d) 1 B. C. C. 316.

(e) 5 T. R. 690.

petitioner had employed the bankrupt as her solicitor to do whatever was needful to the completion of the assignment, she could not be considered as having consented to the annuity remaining in the bankrupt's order and disposition.

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Ordered as prayed ; costs out of the estate.

Ex parte ELIAS MAGNUS.—In the matter of THOMAS GUNDRY and JOHN GUNDRY,

Ex parte EDMUND TURNER.—In the same matter.

*Lincoln's Inn,  
 July 8.*

THE former of these petitions was that of a creditor, praying that the assignees might be restrained from proceeding to adopt, or carrying into effect, the terms of a proposed compromise of several Chancery suits, instituted on behalf of the bankrupt's estate, and from dismissing, or concurring in the dismissal of, the bills in those suits. The other petition was that of the assignee, stating the terms of the proposed compromise, and that they had been agreed to by the majority in number and value of the creditors, at a meeting convened by advertisement for that purpose ; and praying that the compromise might be confirmed and carried into effect.

An advertisement, notifying that a meeting of the creditors of the bankrupts would be held to assent to or dissent from the assignee compromising sundry suits pending in Chancery, in which the assignee was plaintiff and certain persons, to be named at the meeting, were defendants, for the recovery of certain parts or shares in certain copper mines : *Held*, insufficient, in not setting forth the names of the

The suits in question were nine in number, and were instituted by the assignee against different persons who

parties to the suits proposed to be compromised, there being six different suits, to all or any of which the advertisement might apply.

*Quere*, whether the Court will set aside a compromise agreed to at a meeting properly convened, on the ground merely of its being an imprudent agreement, without fraud being suggested.

Neither the bankrupts nor their representatives have a right to appear on petitions relating to compromises of claims on behalf of the estate.

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claimed to be purchasers of certain shares in mines in Cornwall, part, as the assignee contended in those suits, of the bankrupt's estate; and the object of each of the suits was to have the defendants to that suit declared trustees for the plaintiff of the shares to which the suit related; to have a transfer of the shares, and an account of the mesne profits. Three of the suits had been already compromised, and the remaining six were still pending, and were the subject of the proposed compromise now brought in question.

Both the bankrupts had obtained their certificates and had died. By the terms of the proposed compromise, a general power was given to the assignees to grant releases; and a recommendation was made by the creditors present at the meeting, or the major part of them, that the sum of 4000*l.* should be paid to the children of the bankrupt, *John Gundry*, and 1000*l.* to the widow of the bankrupt, *Thomas Gundry*; such sums to be paid only in case the said parties should signify in writing their concurrence in the proceedings of the meeting, and their acceptance of the money, within one month of the date thereof.

The only question decided on the petition was as to the sufficiency of the advertisement summoning the meeting, at which the resolutions in question were agreed to. This advertisement was as follows:—

“ The creditors, as well joint as separate, who have proved their debts under the original and renewed commissions of bankrupt, awarded and issued forth against *Thomas Gundry* and *John Gundry*, of Goldsithney, in the county of Cornwall, merchants, dealers, chapmen, and co-partners in trade, or under either of them, are requested to meet the sole surviving assignee of the

joint and separate estates and effects of the said bankrupts, on the 16th day of September next, at eleven of the clock in the forenoon precisely, at the Star Inn, in the borough of Helston, in the said county of Cornwall, to consider of sundry matters, in regard to the joint and separate estates and effects of the said bankrupts, and, in particular, to assent to or dissent from the said assignee compromising, compounding, submitting to arbitration, or otherwise settling on such terms and conditions as the said assignee may think proper, or as may be agreed to at the said meeting, sundry suits now pending in the High Court of Chancery, wherein the said assignee is plaintiff, and certain persons who will be named at the said meeting are defendants, for the recovery of sundry parts or shares of and in certain tin and copper mines, called or commonly known by the name or names of the Wheal Var Consolidated Mines, situate in the several parishes of Breage and Sithney, in the said county of Cornwall, which belonged to the said bankrupts respectively before and at the time they respectively became bankrupt, and also the like parts of and in all the tin and tin stuff, copper and copper ore, and all other ores, smelting works, chattels and effects, belonging to the said mines, together with the profits received in respect of the same parts or shares, from the time of the bankruptcy of the said *Thomas Gundry* and *John Gundry*, and also to assent to or dissent from the said assignee's compromising, compounding, submitting to arbitration, or otherwise settling, on such terms and conditions as the said assignee may think proper, or as may be agreed to at the said meeting, any or either of such suits, and also to assent to or dissent from the said assignee settling to the same persons, or any or either of them, all or any

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or either of the said parts or shares of and in the said mines, tin and tin stuff, copper and copper ores, and all other ores, smelting works, engines, whins, tools, tackle, and other materials, property, monies, goods, chattels, and effects, together with the said profits so received as aforesaid, or any part or parts thereof, and at such price or prices as the said assignee may think proper, or as may be agreed to at the said meeting, and to make and execute all proper assignments, transfers, releases, and other assurances to the same persons, or any or either of them; and also, in case of any compromise or sale as aforesaid, to assent to the said assignee making such application or applications to the Right Honourable the Lord High Chancellor of Great Britain, or to the Right Honourable the Chief Judge, and their Honours the other judges of the Court of Review in Bankruptcy, at the expense of the said bankrupts' estate, and for the confirmation of any such compromise or sale as aforesaid, as the said assignee may be advised, or to assent to or dissent from the said assignee adopting such other measures in respect thereto as he may think proper, or as may be agreed to at the said meeting, and also to authorise and empower the said assignee to act in and about the joint and separate estates and effects of the said bankrupts as he shall think fit, or be advised for the benefit thereof, and on other special affairs."

Mr. *Bacon* and Mr. *Winstanley* in support of the creditor's petition. The compromise is not for the benefit of the creditors generally; and the petitioner objects to it. He is not bound by the agreement; for it is one, which the assignees have no power, under the act, to enter into. The act does not enable them to make gifts to the

bankrupts' family. Besides, the advertisement did not give the petitioner, and the other creditors who did not attend the meeting, sufficient intimation of what was proposed to be done; so that they have had no opportunity of objecting to it. The notice in the Gazette does not even state what suits were intended to be compromised. [The *Chief Judge*. Before I come to the question of the expediency of carrying into effect the proposed compromise, I must be satisfied of the sufficiency of the advertisement. Supposing the advertisement to be regular and sufficient, is there any case in which the Court has interfered at the instance of a creditor to set aside a compromise on the ground simply of its being an imprudent agreement, where no fraud is suggested?] We have not been able to find such a case, but we submit that, on general principles, the Court would not allow the assignees to carry into effect a grossly improvident compromise, if any creditor objected to it.

Mr. *Goodeve* appeared on behalf of the personal representatives of the bankrupts, and was about to support the view taken by the petitioner *Magnus*.

The CHIEF JUDGE. Why do the personal representatives of the bankrupts appear?

Mr. *Bacon*. It has been the practice, of late years, to serve the bankrupt or his personal representatives with any petition relating to the compromise of any claim on behalf of the estate.

The CHIEF JUDGE. If no party objects, the counsel,

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for the bankrupts' representative may be heard, by permission, but not by way of right, or so as to form a precedent.

Mr. *Goodeve* then addressed the Court in opposition to the compromise.

Mr. *Shapter* for the official assignee. It is doubtful whether the advertisement gave sufficient intimation of what was to be done at the meeting, and the official assignee does not wish to act without the sanction of the Court. He cited *Douglas v. Brown* (a), *In re Hennessy* (b), *Nerot v. Wallace* (c), *Ex parte Whitchurch* (d).

Mr. *Swanston* and Mr. *Follett* for the creditors' assignee. The creditors were, by the advertisement, sufficiently apprised of the objects of the meeting, and no additional information would have been conveyed to them by a long catalogue of the names of all the parties to the six chancery suits. It is not the usual practice to insert the names of the parties, and if reference were made to orders which have been made sanctioning the proceedings of meetings assembled for purposes not strictly statutable, it would be found that the notices by advertisement are in the same form as this. Attempts have been made to obtain orders authorising assignees to compromise suits generally, and *Ex parte Whitchurch* condemns an order of that sort, but does not, by any means, apply to the special authority given, in a particular case, by the resolutions of a meeting of creditors, convened by an advertisement like that now under con-

(a) Mont. 93.

(c) 3 T. R. 17.

(b) 2 Dr. & W. 556; 1 Con. & Laws. 559.

(d) 1 Atk. 91.

sideration. The terms of the advertisement comprehend every one of the subjects of the resolutions, which is all that it is really important or material to notify to the creditors.

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Mr. *Bacon*, in reply, was stopped by the Court.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—If this advertisement is insufficient, it is not a matter for censure or surprise, for it is a subject on which there is little of decision to be found, and if a mistake has been made, it is one which might have been made easily and without blame attaching to any one. I have no doubt that those who framed it endeavoured to give all the particulars which they thought could be required. In my opinion, however, the advertisement was not sufficient. It does not give that information which the statute meant to require and has required. I am of opinion, that it is not sufficient to mention merely the subject-matter of the suit without mentioning to which of the existing suits the proposed compromise was to extend. Mr. *Swanston* said he considered it to be the general habit and practice to omit the names of suits in advertisements; I accordingly thought it as well to look at what professional men, who had written on the subject, considered to be the practice in this respect. And first, I find the form given in Lord *Henley's* (a) book is this:—

“The creditors who have proved their debts under the bankruptcy of A. B., of, &c. are desired to meet the assignees of the estate and effects of the said bankrupt on the 21st of January instant, at eleven o'clock in the

(a) Lord Henley on the Bankrupt Law, p. 163 (3d edit.).

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forenoon, at, &c., to assent to or dissent from the said assignees commencing and prosecuting a suit in equity against B. C. of, &c. [or, 'to assent to or dissent from the said assignees submitting to arbitration a certain action now depending and at issue in his Majesty's Court of, &c. wherein the said assignees are plaintiffs and B. C. of, &c., is defendant.']"

The names are here mentioned. I agree that it might often be sufficient to mention the subject and not the name. There is this note to the form in Lord *Henley's* book:—

"The particular purpose for which the meeting is called should always be inserted in the advertisement, as the absent creditors will not be bound by the determination of the creditors convened by an advertisement which does not specify the occasion."

But there is no form in the book as to the compromise of suits. I next looked at Messrs. *Montagu* and *Ayrton's* book, the form there is as follows: (a)

"The creditors who have proved their debts under a fiat in bankruptcy issued and now in prosecution against S. W., of [the bankrupt], are desired to meet the assignees of his estate and effects on the — day of — next, at —, in the — noon, at —, to assent to or dissent from the said assignees compounding with A. B., a debtor to the said bankrupt estate, and taking any reasonable part of the debt in discharge of the whole, giving time or taking security for the payment of such debt, and submitting any dispute between such assignees and the said A. B. concerning any matter relating to such bankrupt's estate, to the determination of arbitrators, to be chosen by such assignees and the

(a) *Montagu and Ayrton on the Bankrupt Law*, vol. ii. p. 137.

major part in value of such creditors and the said A. B., the award of such arbitrator to be binding on all the creditors of the said bankrupt, and also to assent to or dissent from the said assignees commencing a suit in equity against C. D. to [set out the object of the suit], and on other special affairs."

The next book to which I have referred is *Archbold's Treatise*, edited by Mr. *Flather*; this I have also found a very useful work when I have had occasion to refer to it, the form given there is as follows:—

"The creditors who have proved their debts under a fiat in bankruptcy, awarded and issued forth against *Joseph Styles*, of — street, in the city of London, builder, dealer and chapman, are desired to meet [the assignees of his estates and effects] on the 15th day of July next, at eleven of the clock in the forenoon, at the Court of Commissioners of Bankrupt, Basinghall-street, in the city of London, in order to assent to or dissent from the said assignees compounding, settling and adjusting a certain debt due to the said bankrupt from one *Charles Thompson*, and to submit to the arbitration of *A. L. Esq.*, barrister at law, all matters in difference between the said bankrupt and one *James Lambton*, and to commence and prosecute a suit in equity against one *George Short*, to foreclose a certain mortgage of said bankrupt in certain lands of the said *George Short*, or otherwise to obtain payment of the principal money and interest due upon the said mortgage, and on other special affairs."

Therefore, as far as anything is to be learned from any printed collection of forms, it appears that the practice has been to insert names. [Mr. *Swanston*. I believe the *Gazette* would furnish a very different collection of

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forms.] I think this advertisement insufficient, which renders it unnecessary to decide whether, if all things had been conformable to the statute and the statute applied, this Court would or would not be precluded from entering upon the other question here raised.

An ORDER was then taken by consent of all parties to confirm the compromise as to one of the suits, and the rest of the petitions was ordered to stand over.



Ex parte JOHN WOOLSTON.—In the matter of ARCHIBALD MORTON, ARCHIBALD RODICK, and CHARLES MORTON.

Lincoln's Inn,
July 8.

1. Where bills of costs of the solicitor to the fiat had been taxed and paid before 1835, and the assignees' accounts containing these payments had been audited and passed by the Commissioners, and one of the solicitors to the fiat and two of the assignees had since died, *held*, that a petition for retaxation, presented in 1844, came too late, whether the case came within the act 6 & 7 Vict. c. 73, or not; as to which, *quære*.

THIS was a petition of a creditor, for the retaxation of two bills of costs of the solicitors to the fiat, which had been paid without having been taxed, and for the taxation of several other bills, which had been paid after taxation.

The commission of bankruptcy issued in December 1825, and the petitioner had proved under it a debt of 20l. In 1843, the proceedings under the commission, which had been worked at Wellingborough up to that time, were transferred to the Court of Bankruptcy in London. Messrs. *Hodson* and *Burnham* had been the solicitors to the petitioning creditor, and were, and continued up to the death of Mr. *Hodson*, in February 1829, the solicitors to the commission. On the death of Mr. *Hodson*, in February 1829, Mr. *Burnham* entered into partnership with Mr. *Henry Matthew Hodson*, and the bills delivered in and before 1834, and paid without being taxed by the assignees, by payments on account, ending in 1834, *held*, that the statute did not prevent taxation, and that the petition was not too late.

two, under the firm of *Burnham* and *Hodson*, acted as solicitors to the commission till October 1833, when the partnership was dissolved, and Mr. *Burnham* alone became the solicitor to the fiat. Five of the bills of costs in question were those of the first firm, of *Hodson* and *Burnham*, amounting to 386*l.* 6*s.* 8*d.*, 627*l.* 1*s.* 11*d.*, 668*l.* 18*s.* 10*d.*, 668*l.* 11*s.* 9*d.*, and 651*l.* 3*s.* 5*d.*, all of which, except the bill for 651*l.* 3*s.* 5*d.*, had been taxed by the Commissioners, at various times, in and before the year 1830. Two other of the bills were the bills of the second firm of *Burnham* and *Hodson*, amounting to 620*l.* 12*s.* 6*d.* and 261*l.* 12*s.* 7*d.*, the latter of which had been taxed in 1834. Another bill was that of Mr. *Burnham* alone, after the dissolution of the partnership, to the amount of 95*l.* 10*s.* 7*d.*, which had been taxed in November 1834, at the sum of 92*l.* 7*s.* 7*d.* The petition stated that all these bills contained improper charges, and set forth the particulars of the items complained of. The prayer was, that the bills, amounting to 651*l.* 3*s.* 5*d.* and 620*l.* 12*s.* 5*d.*, might be taxed, and that the other bills might be retaxed, with the usual consequential directions.

One of the assignees died in April 1832, another in February 1844; there remained a third, who was the sole surviving creditors' assignee.

The respondent, Mr. *Burnham*, stated in his affidavit, that the untaxed bill of 651*l.* 3*s.*, related to suits at law and in equity, and commenced with an item dated in 1827, and ended with one dated in February 1829; that it was delivered to the assignees soon after the death of Mr. *C. H. Hodson*; that the other untaxed bill of 620*l.* 12*s.* 5*d.* also related to suits at law and in equity, and was delivered to the assignees in November 1834;

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that although the Commissioners did not tax the bills (which the law did not authorise them to do), yet the payment of them was allowed by the Commissioners, in auditing the assignees' accounts, such payment having been made several years ago, by payments on account to the deponent and his partners, at various times, between December 1825 and December 1834, the last payment being one of 159*l.* 17*s.* 11*d.*, made on December 2nd, 1834, and a receipt having been given for it to the then assignees; that the surviving creditors' assignee was not conversant with business of the kind, transacted by the deponent and his partners, and had been principally guided by his late co-assignees, to whom he had left the management of all matters relative to the estate of the bankrupts, and that justice could not be done to the respondent in a taxation of the bills, now that he was deprived of the assistance and evidence of the deceased assignees.

Mr. *Russell* and Mr. *Rolt* in support of the petition. The case of a solicitor to a fiat is not like that of a solicitor to a private individual. The creditors do not know what is going on, and lapse of time cannot have the same effect as regards them as it might have in the case of a private client. They cited *Scougell v. Campbell*(a).

Mr. *Swanston* and Mr. *Bacon* for the solicitors. The petition is disposed of by the act 6 & 7 *Vict. c. 73*, s. 41(b), and the recent cases upon that statute, viz.

(a) 3 *Russ.* 545.

(b) " And be it enacted, that the payment of any such bill as aforesaid shall in no case preclude the court or judge, to whom application shall be made, from referring such bill for taxation, if the special circumstances of

Binns v. Hay (a), and *In re Downes* (b), and *Sayer v. Wagstaff* (c).

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Mr. Rolt, in reply, cited *Ex parte Gregson* (d), *Ex parte Neale* (e), and *Ex parte Emery* (f), and contended that as 6 Geo. 4, c. 16, s. 14, was not repealed by the new act, the latter statute did not apply.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—The opening of the petitioner's case did not impress me, nor has anything since said on either side impressed me, with an opinion that such of the bills in this case as were taxed by the Commissioners ought to be retaxed, or that the others ought not to be taxed or examined. Assuming the statute 6 & 7 Vict. not to prohibit any order from being now made for taxing or retaxing the *taxed* bills (but without deciding that point), I am of opinion that, so far, the petition ought to be dismissed. It was before the year 1835 that they were taxed and paid, and that the assignees' accounts, containing the amount of them, were audited and passed by the Commissioners. These bills extend over a space of time commencing in 1825 and ending in 1834, the present petition not having been presented until April 1844. For the delay, not any excuse, apology or reason, that can be considered substantial or sufficient, has been offered or suggested. The commission, it is true, was a country commission.

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the case shall, in the opinion of such court or judge, appear to require the same, upon such terms and conditions, and subject to such directions as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

(a) 7 Jurist, 1154.

(b) 5 Bea. 429.

(c) 5 Bea. 161, and on appeal before L. C., 8 Jurist, 1083.

(d) 3 Mad. 49.

(e) Buck, 111.

(f) Buck, 422.

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But the petitioner, who proved before 1834, or any creditor, might have availed himself, in 1835, of the 14th and 101st sections of the 6 *Geo.* 4. There is not, however, any proof or suggestion that, previously to the present year 1844 (either before or after the passing of the act of 1842), any attempt or endeavour was made, on the part of the petitioner, or any of the creditors, to have the bills or either of them taxed, or to examine the assignees' accounts, or to obtain information from the assignees and the solicitor, or either of them. I cannot assume that any materially greater facility for the purpose was substantially afforded by the statute of 1842, which, however, itself came into operation before 1843. It would be too much to say, that in the absence of proof of fraud or improper conduct on the solicitor's part (terms, within which charges, that on taxation ought to have been reduced or disallowed, do not of necessity come), there ought, after such a lapse of time, under such circumstances, to be an investigation of these bills. It is said, however, that the items which the petition and the argument have specifically challenged, are so obviously improper as to be, of themselves, evidence of fraud. To this, if I could accede in any case, I cannot in the present. I must recollect what Mr. *Burnham's* affidavit states. I must recollect that the Commissioners have not been charged with corruption or wilful malversation, and are not parties to this proceeding. Under such circumstances, to compel the solicitors to refund the fees wholly or partially, would, as it seems to me, be unjust, when the solicitors are not alleged to have paid any of the fees with a fraudulent or corrupt intention. It must be remembered that the assignee who chiefly acted, another assignee, and one of the solicitors to the commission,

who, up to some time in the year 1829, had been in partnership with Mr. *Burnham* (of neither of whom is there any personal representative before the Court), died before this petition was presented; that there is reasonable probability of its being now difficult or impossible to prove or explain some circumstances which might, in the year 1835 or 1836, have been proved or explained with ease; and that, in my judgment at least, a lapse of six years, not sufficiently accounted for, is enough to preclude a creditor from availing himself, as a matter of course, of the 14th section of the 6 *Geo.* 4, c. 16. Under all the considerations of law and fact belonging to this case, including the principles on which Lord *Cottenham's* decisions in *Horlock v. Smith* (a) and Dr. *Sutherland's case* (b) (principles to which I entirely accede) proceeded, I cannot decide that impropriety of conduct is established against either of the solicitors; however strongly I may, as I do, conjecture that the taxed bills contain some charges which might and ought to have been reduced or disallowed, and that too light a hand or a not very close attention was used in taxing them. I think, on the whole, that justice will be done by dismissing the petition without costs as to the taxed bills.

But as to the bills which have never been taxed at all, I think that I cannot hear the respondents say, that these bills have, for any effectual purpose, or in any effectual sense, been paid. I conceive that, notwithstanding the deaths to which I have referred, and notwithstanding the lapse of time, these must be investigated, the statute 6 & 7 *Vict.*, in my opinion, not prohibiting it or creating any impediment in the way, as this case is circumstanced, however that statute may operate, if in

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(a) 2 *Myl. & Cr.* 496.(b) *Waters v. Taylor*, 2 *Myl. & Cr.* 526.

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truth it has any operation, as to the bills which were taxed. The Order must be, as to the two untaxed bills, to refer it to the Commissioner to inquire what amount, in December 1834, it was fit and proper to allow in respect of them to the solicitors, now respondents, respectively; and the Commissioner is to make such reduction in them (if any) as he may consider just; and the two solicitors and the survivor of the original assignees are to be examined, on oath, before the Commissioner, if the Commissioner shall think fit, whether the petitioner or the official assignee shall or shall not require the same; and the Commissioner is to be at liberty to state any circumstances specially, with regard to such difficulty, if any, as he may find in the way of a complete and satisfactory examination of such bills, in consequence of lapse of time, the deaths of any persons deceased, loss of papers (if any), or otherwise. I reserve the costs of this inquiry.

Ex parte WILLIAM MAXWELL.—In the matter of JOHN
BRETTARGH.

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16, 20.

Debts had been proved, and real or leasehold property had been sold under a fiat, issued in June 1842, but the bankrupt had not obtained his certificate. *Held*, that a petition of a creditor, who had no lien and had not proved, presented in June 1844, to annul the fiat, for legal

THIS was the petition of a creditor to annul the fiat for want of trading and of an act of bankruptcy. The fiat was dated May 28, 1842, and the petition was presented in June 1844. The bankrupt had not obtained his certificate. The assignees and petitioning creditor filed affidavits to prove the trading and act of bankruptcy, and to shew that the petition was really the petition of the bankrupt.

invalidity, the delay not being accounted for, came too late.

Mr. *Swanston* and Mr. *Torriano* in support of the petition.

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Mr. *Bacon* for the assignees.

Mr. *Anderdon*, for the petitioning creditor, referred to *Ex parte Gregory (a)*.

The bankrupt had been served but did not appear.

Upon his Honour inquiring if any case could be found where, after three years delay unexplained, a fiat had been annulled for legal invalidity, the counsel asked for time to look for precedents, and the case stood over till the next day.

The case came on again accordingly on this day.

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The CHIEF JUDGE. Assume, for the purpose of the argument, the absence of the legal requisites.

Mr. *Swanston* and Mr. *Torriano*. We have not been able hitherto to find any reported case in which the point has been decided; but there are many in which it must have been assumed, and there is none in which a creditor, applying to have the fiat annulled at any time before the certificate has been obtained, has been held to be too late. Indeed the objection appears never to have been taken where the certificate has not been obtained; and this, we submit, is sufficient to show that the general opinion is that it would not avail. In *Ex parte Crowther (b)* a creditor presented a petition two years after the certificate had been confirmed, and Lord *Eldon* there said, "I never knew an instance where the

(a) 3 M. D. & D. 572.

(b) 2 Rose, 324.

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bankrupt's *certificate* has been taken from him because there was no petitioning creditor's debt, no trading, or no act of bankruptcy;" not adverting at all to the length of time, but putting the refusal to interfere entirely on the ground of the certificate having been obtained. Perhaps, in analogy to proceedings at law, the Court would require a creditor to petition to annul the fiat within six years, but hitherto no limit has been fixed. In *Ex parte Levi* (a) the Court dismissed a petition to annul entirely on the ground that the certificate had been obtained. In *Ex parte Bonsor* (b) it appears from the registrar's book, that three years and five months had elapsed since the commission issued, and yet it was superseded upon the petition of a creditor. In *Ex parte Moule* (c) the petition was presented five years after the commission issued, and Lord *Eldon's* attention was expressly called to the lapse of time, but it was not the ground on which he dismissed the petition; for he said that if the petition had been presented before the certificate was obtained, having regard to the debt of the petitioning creditor, and what appeared to have been sworn upon the proceedings, he could not have superseded the commission without giving the petitioning creditor the opportunity of trying the validity of the debt; evidently intimating that, if there had been no certificate, the commission might have been superseded, notwithstanding the lapse of time, provided the petitioner could have successfully impeached the petitioning creditor's debt. In *Ex parte Wyatt* (d) in the same way the dismissal of the petition was grounded entirely on the fact of its not being presented till twelve months after the certificate was obtained; the time for

(a) Buck, 76.

(b) 2 Ro. 61.

(c) 14 Ves. 602.

(d) 1 M. & A. 408; 3 D. & C. 665.

the issuing of the commission was not there, and is not in any of the cases considered They also referred to *Ex parte Cutten (a)*.

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The case having again stood over till this day for the purpose of further search being made for precedents in the order books,

Mr. *Torriano* admitted that he had not succeeded in finding any exactly in point: he referred however to *In re Bass (b)*, where the commission was issued 24th February 1816, and was superseded on the petition of the bankrupt presented May 12, 1818, and *In re Henry Cooper (c)*, where a commission issued on the 24th January 1815, was superseded on the petition of the bankrupt on the 10th July 1816, for want of trading.

The CHIEF JUDGE. In those cases the petitioner was the bankrupt, whom the Court could put upon terms.

VICE-CHANCELLOR KNIGHT BRUCE, C. J. (without calling on the counsel for the respondents.) This is the case of a petition to annul a fiat, on the ground of the absence of some of the legal requisites,—on the ground of legal invalidity only,—presented by a creditor who has not proved.

Upon the question of the sufficiency of the evidence on this head, in support of the bankruptcy, I have not heard the counsel in opposition to the petition, and I do not decide that question against them; but I assume,

(a) Buck, 68. (c) Order Book, vol. 156, p. 258, Aug. 12, 1820.  
(b) Order Book, vol. 154, p. 16, Nov. 5, 1819.

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for the present purpose its insufficiency; I assume, further, that the materials on which the adjudication proceeded were, of themselves, on the face of them, insufficient. I assume, in the petitioner's favour, that the ground of his proceeding being legal invalidity merely, the only point for him to establish is, that he has come within proper time. With this observation only, in passing, that it seems to me probable that were the Court with him on this point, it would not be able, upon the materials before it, to arrive at a conclusion against the bankruptcy.

Has then the petitioner come too late? That such a petition may be too late, his counsel have conceded, and could not, I think, have reasonably disputed. They have also stated that there is neither enactment nor authority, fixing any period, within which a petition of this kind (a creditor's petition) must be presented; but have suggested that, from analogy, it would probably be correct to hold a period of six years from the bankruptcy, or adjudication, or from the advertisement of the adjudication, to be the time within which such a proceeding may, and, in the absence of special circumstances, must be commenced. They have further argued, that, from some of Lord Eldon's decisions, the opinion of that most distinguished and most experienced judge may be collected to have been, that, where the bankrupt has not obtained his certificate, such a petition, if within two or even three or four years from the adjudication, must be within time, unless there be some defence against the petitioner, arising from his own conduct, beyond mere inaction.

I am not satisfied that such an opinion is to be collected from either of the cases that have been mentioned

at the bar, or that Lord Eldon ever entertained it. But, if his Lordship did so view the matter under the bankrupt law, as it stood before 1825, it does not, therefore, I apprehend, follow, that he would so have viewed it under the statute law, as it has stood since 1842, and now stands.

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Nor am I able to agree with the learned counsel's suggestion as to a term of six years.

The truth I apprehend to be that, in all cases of imputed invalidity, whether legal or equitable, whether on the petition of the bankrupt or of a creditor, or any other person, it was always and is in the discretion of the Court, having the jurisdiction, which this Court now has, to supersede or annul, or to refuse to supersede or annul; a discretion certainly to be exercised judicially and upon principle, and with due regard to authority and precedent, but still a discretion. It cannot be said that it was *ex debito justitiæ* to supersede a commission of bankrupt, or is *ex debito justitiæ* to annul a fiat, in every case of absence of the legal requisites.

All precedent and practice are against such a proposition. It is clear that a case may exist, in which, though there be a plain and admitted absence of every legal requisite, it may be the manifest duty of the Court to dismiss a petition seeking to annul the fiat, whether it be the petition of the bankrupt, of a creditor, or any other person; and though the petitioner may not have actively done anything to bar or preclude his title to relief.

Each case is one of circumstances, among which is the lapse of time; a consideration of more or less weight, according to the nature of the facts involved in the particular controversy. As a case may be conceived, in

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which, upon legal invalidity, it would be the duty of the Court to annul a fiat upon a petition presented more than six years after the adjudication, so, according to my understanding of the law and practice, a case may well exist, in which every legal requisite being deficient, and the bankrupt not having obtained his certificate, the petition of a creditor to annul a fiat, presented within a year after the adjudication, though the petitioner have not actively done anything to defeat or diminish his rights, may be a petition, which, upon the opposition of the assignees, ought to be dismissed.

I repeat, that all the circumstances of each case are to be considered. How then does the present petitioner stand?

In the first place it is, I apprehend, consistent with authority equally and principle to say, that a Court, asked to give relief, which is not *ex debito justitiae*, but of which the refusal is within the compass of its lawful functions, is justified, in requiring the applicant to show that he has proceeded without unnecessary delay, and with reasonable diligence, or to show, in a case where without any reason or excuse the commencement of the proceeding has been delayed for a considerable time, as, for instance, a twelvemonth or upwards beyond the period at which it might have taken place, and where its success must vary the rights of persons perfectly innocent and blameless, that those rights will not be affected prejudicially, or will not be affected otherwise than they would have been, had the proceeding been commenced with diligence.

In the present instance, the fiat, the adjudication, the advertisement, and the choice of assignees were all, as early as June 1842, and in the same year 1842 twenty



creditors proved their debts under the fiat. The assignees collected some assets, and have sold some real or leasehold property under it. After which, and not until June 1844, was this petition presented, not by an execution creditor, not by a judgment creditor, but by a mere creditor without security or lien of any kind, who, as I have said, has not proved, and whose right of suing the bankrupt has not been defeated, inasmuch as the bankrupt has not obtained his certificate.

It is plain, however, that the bankrupt, who has been served with the petition, but has not appeared upon it, is, and before the presentation of the petition was, precluded by lapse of time and his own inaction, from questioning its validity, as far as he is concerned.

Not any reason or excuse of any kind for not presenting the petition sooner than it was presented has been shown. It is consistent with the allegations of the petition, with the evidence, and with probability, that the petitioner was in June 1842 aware of the fiat and adjudication. Nor has he proved, or by his petition alleged, that he was not as early as that time apprised of the objections to the legal validity of the fiat.

The purchaser of the property sold by the assignees does not appear on the petition, and I suppose has not been served with it. What is to become of his title, if, upon the application not of the bankrupt, but of a creditor, I annul the fiat? How, if I do so, can I be sure of not inflicting irreparable mischief on the creditors who have proved? How am I to secure a reasonable mode of acting between the bankrupt and the assignees? Under the circumstances, in my judgment, this creditor comes too late, and Sir *George Rose*, to whom I have stated the case, is of the same opinion. Whether, if

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this petition had been presented and heard in 1824, under the statute law as it then stood, the facts in all respects being as they are now, except substituting the years 1822, 1823 and 1824, for the years 1842, 1843 and 1844, it would or would not have been right to dismiss it, I do not consider it necessary for me to pronounce a judicial opinion. Considering, however, that this fiat is good against the bankrupt, who has not obtained his certificate, and considering what the present state of the bankrupt law is, I have not the least hesitation in dismissing the petition.

It may be right to mention an affidavit by the petitioner, that upon the question of delay, has been sworn and filed during the progress or after the termination of the hearing of the petition.

Whether this affidavit ought or ought not to be considered as part of the evidence, I repeat my opinion to be, that there is an entire absence of any fair or rational excuse for the petitioner's delay. If the affidavit is of any weight at all, it seems to me to bear rather against than for him.

Upon the case being then spoken to, on the subject of costs,

HIS HONOUR said, I have not thought and do not think it necessary to decide whether the evidence before the Court—I mean the depositions and affidavits together—is sufficient to establish the legal validity of the fiat, or the fact that the petition is in truth and substance the petition of the bankrupt. Not only, however, do I see enough to induce me to think it probable that the result of a trial at law, or of a *vivá voce* examination before the Court as to each of these two questions, would

be unfavourable to the petitioner, but the inclination of my opinion upon the materials before me (having regard not only to what is sworn, but to the persons who swear and the manner of swearing,) is, that those materials are sufficient to establish the legal validity of the fiat, and that this petition is truly and substantially the petition of the bankrupt. This, however, as I have already said, I do not decide. But considering, as I have stated, that the petition comes too late—considering the nature of the petition, the evidence which the petitioner has adduced, and the uncertainty which the respondents must have felt, or might have fairly felt, as to the grounds upon which the petition might be decided—considering, therefore, that the respondents are in my opinion not blameable for entering into evidence on both the points which I leave undecided, I conceive that if they claim to have the petition dismissed with costs, I cannot justly refuse so to dismiss it.

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**Ex parte DAVID COOPER and JOHN COOPER.—In the matter of WILLIAM TAYLOR.**

**THIS** was the petition of the vendors of a freehold estate claiming a lien for unpaid purchase money, and the only question was as to costs. In October 1841, the petitioners agreed to sell, and the bankrupt agreed to purchase, for 14,000*l.*, certain freehold property belonging to the petitioners; and it was further agreed, that upon the execution of a written agreement the bankrupt should be let into the possession of the rents and profits of the

*Lincoln's Inn,  
July 17.*

Where there was a sufficient part-performance to take a parol contract for sale out of the Statute of Frauds, and the purchaser became bankrupt; *Held*, that the vendor seeking to have effect given to his lien for unpaid purchase-money,

was entitled to have his costs out of the estate sold.

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and another.

premises, together with the crops of hay, corn and other produce thereof. It was further agreed between the petitioners and the bankrupt, that on or before October 1st 1841, the bankrupt should pay the petitioners 1000*l.*, and on January 1st 1843, and the 1st of January in each and every year then next following, a further instalment of 1000*l.* until the whole purchase money and interest thereon at 5*l.* per cent. per annum should be fully paid, such interest to commence from the 1st day of January 1842, and to be paid and payable half yearly on the 1st day of July and the 1st day of January in each year, and it was also agreed that on payment of the whole sum of 14,000*l.* and interest as aforesaid, the petitioners should deliver up to the bankrupt the title deeds, and that in the mean time the same should be deposited with and held by the petitioners as and by way of security for payment of such sums as should or might be due or payable to the petitioners in respect of the purchase.

A written agreement, purporting to be made between the petitioner and the bankrupt petitioner embodying the above terms, was drawn up and afterwards ingrossed on paper duly stamped, but by reason of the distance at which the petitioners and the bankrupt lived apart, and the mutual confidence which existed between them, the signature was from time to time delayed, and the written agreement was in fact never signed or executed by any of the parties.

Immediately after the contract was entered into, the petitioners put the bankrupt in possession, and the bankrupt occupied some part himself of the premises and let off the remainder, the rents of which he regularly received until the time of his bankruptcy.

Soon after the contract was entered into, the bank-

rupt paid to the petitioners 1000*l.*, and on the 2nd of January 1843 the further sum of 1000*l.* on account and as part of the sum of 14,000*l.*, the consideration for the purchase. The petitioners according to the agreement retained all the title deeds by way of security.

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 and another.

Mr. *Swanston* and Mr. *Torriano* in support of the petition. Though the memorandum is not signed, still as the agreement has been partly performed, the petitioner is entitled to his costs.

Mr. *Anderton* for the assignees. This is simply the case of an equitable mortgagee without a memorandum in writing, and the rule is that he must pay costs.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—As it is not disputed that there has been a sufficient part performance to take this case out of the Statute of Frauds, I think the statute should be excluded from consideration, and that the petitioners are entitled to have their costs out of the security, which happens to be the rule in the case of an equitable mortgage with a written memorandum.

Ordered accordingly.



1844.



*Lincoln's Inn,  
July 17 & 22.*

Merchants procure accommodation from bankers on entering with sureties into a covenant to pay the floating balance due from time to time up to a certain limited amount, subject to a proviso that in the event of the merchants' bankruptcy, and in the event of the amount due exceeding at that time the fixed limit, any dividends received under the bankruptcy should be applied exclusively in payment of the excess, without the sureties being entitled to any part of the dividends until the whole of such excess was paid. Some of the sureties take from one of the principal debtors a counter-security and indemnity in respect of their liability under the covenant, but without the bankers having notice of the transaction. The merchants become bankrupt, being indebted to the merchants beyond the limit fixed by the deed, and the bankers receive dividends on the whole debt, and recover the amount secured by the deed from the sureties, two of whom are reimbursed by means of their counter-security out of the separate estate of one of the bankrupts. *Held*, that the bankers were entitled to retain the whole amount so received by them.

Ex parte HENRY PHILIP HOPE, THOMAS ENGLAND, JOHN WILSON and ROBERT HUDSON.—In the matter of JOZE LOUIS FERNANDES, NOWELL LOUIS FERNANDES and GEORGE LOUIS FERNANDES the Younger.

THIS was the petition of the assignees seeking to have a proof reduced, on the ground that the proving creditors had received payment in full of part of the debt proved. By an indenture dated December 13th 1839, made between the bankrupts of the first part, *Jeremiah Todd Naylor, John Naylor, Richard Dunn and Thomas Taylor* (who were sureties), of the second part, and *William Leatham, Edward Tew and William Henry Leatham* (the creditors, who were bankers), of the third part, the bankrupts and the sureties jointly and severally covenanted to pay on demand to the bankers all such sum and sums of money as on a balance of account might at any time or times be owing to the bankers, with commission and usual charges, not exceeding in the whole 10,000*l*.

The deed contained a proviso, that if the bankrupts, or any of them, their or any of their executors or administrators, either alone or jointly with any person or persons who might at any time or times thereafter be or become partner or partners with them or any of them, should become bankrupts or insolvents, or make a composition with or execute an assignment for the benefit of creditors, and if at the time of such bankruptcy or insolvency, or of making or executing such

composition with or execute an assignment for the benefit of creditors, and if at the time of such bankruptcy or insolvency, or of making or executing such

composition or assignment as aforesaid, there should be due and owing to the bankers or any of them, either alone or jointly with any person or persons who might be or become partner or partners with them or any of them in the banking business, or to other the person or persons for the time being constituting the firm of the banking house, or to their or his executors, administrators or assigns respectively, or any of them, upon the balance of any such banking account as aforesaid, more than the sum of 10,000*l.*, then and in such case all such dividends, composition or compositions, or other payments or sums of money as the bankers either alone or jointly as aforesaid, or other the person or persons for the time being constituting the said last-mentioned firm, their, his or their executors, administrators or assigns, or any of them, or the said *J. T. Naylor, J. Naylor, R. Dunn* and *T. Taylor*, or any of them, their or any of their heirs, executors or administrators, or any of them, should receive or become entitled to under or upon any such bankruptcy, insolvency, composition or assignment as aforesaid, in respect of the whole or any part of the balance of the said account, should be applied in the first place in or towards satisfaction of so much of such balance as should exceed in amount the sum of 10,000*l.*, without *J. T. Naylor, J. Naylor, R. Dunn* and *T. Taylor*, or any of them, their or any of their heirs, executors or administrators being entitled to or to the benefit of such dividends, composition, or other payment or sums of money, or any part thereof respectively, until the whole of such excess of the said banking account should be fully discharged.

The fiat issued on December 7th 1842, and, under it, the bankers proved debts amounting together to

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17,568*l.* 13*s.* 2*d.*, excepting on the occasion of such proofs the indenture of the 13th day of December 1839, as part of the securities in their hands for the debts proved.

On the 29th of March 1843, a dividend of 2*s.* 3*d.* in the pound was paid on the amount so proved.

It appeared that one of the sureties, *T. Taylor*, had procured from one of the bankrupts a deposit of the title deeds of a freehold estate, the separate property of that bankrupt, by way of counter security and indemnity in respect of the surety's covenant in the indenture of the 13th day of December 1839. *T. Taylor* afterwards sold this estate for 3825*l.*, and paid the proceeds to the bankers in part discharge of his liabilities under the indenture.

*J. T. Naylor* and *J. Naylor* had also procured similarly, by way of counter-security and indemnity, an assignment of a share which the same bankrupt had in the partnership stock and effects of *J. Naylor & Co.* and *Naylor and Lee*, and the proceeds of this share, amounting to 6000*l.*, were paid over to the bankers in discharge of *J. T. Naylor* and *J. Naylor's* liabilities under the indenture.

On the 12th January 1843, a fiat issued against *R. Dunn*, and on the 28th May 1844, his assignees paid to the bankers 364*l.* 5*s.*, in full discharge of the liabilities of *R. Dunn* under the indenture.

The petition prayed that the proofs by *E. Tew* and *W. H. Leatham*, amounting altogether to 17,568*l.* 13*s.* 2*d.*, might be reduced to 7568*l.* 13*s.* 2*d.*, and that *E. Tew* and *W. H. Leatham* might be ordered to refund and repay to the petitioners the said two dividends of 2*s.* 3*d.* in the pound and 1*s.* in the pound on the sum of



10,000*l.* part thereof, making together the capital sum of 1625*l.*, together with interest thereon; and that the sum of 1625*l.* and interest might be paid to the petitioner *H. P. Hope*, as such official assignee as aforesaid, to be applied by him as part of the bankrupts' estate, and that the proof might stand at the sum of 7568*l.* 13*s.* 2*d.* only.

It did not appear that the bankers had any notice before the bankruptcy of the counter-securites and indemnities which had been taken by the sureties.

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*Mr. Russell* and *Mr. Steere* in support of the petition. The case would be quite free from question, were it not for the proviso in the deed that the dividends received upon the whole debt should be applied in payment of part of it; now such a provision is a fraud upon the bankrupt law and cannot be permitted to prevail. [The *Chief Judge*. The sureties who paid a portion of the debt would or might have been entitled to the dividends on that portion, if there had been no such proviso; by the proviso they in effect sell their right in these dividends to the creditor. Is not the question whether those who sold these dividends had a right to sell them?] It is an attempt to defeat the administration of assets according to the bankrupt law. Besides, in this case, by means of the counter-security and indemnity, the bankrupts' estate as to the greater part of the debt pays twice over: once in full, and then in the shape of a dividend. They cited *Ex parte Holmes* (a) and *Wilson v. Greenwood* (b), and stated that the assignees had not presented the petition without advice entitled to the highest consideration. [The *Chief Judge*. As you say you have an opinion in your favour, I will take further time to consider the

(a) *Mont. & Ch.* 301.

(b) 1 *Swanst.* 471.

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question, and if I find any difficulty will call on the other side.]

On this day HIS HONOUR pronounced the following judgment, without calling for any argument on behalf of the respondents. This may be described as a case of a creditor, debtor, and surety, in which it was part of the bargain between the creditor and the surety, with the privity and concurrence of the debtor, that if the debtor should become thereafter bankrupt and be then indebted to the creditor in a sum beyond the amount (a limited and defined amount), for which the surety agreed to be responsible, the dividends upon the entire proof of the creditor under the bankruptcy should belong to the creditor, without any right on the part of the surety, though fully discharging his obligation, to claim to stand in the creditor's place as to any part of those dividends, that is, the surety agreed to relinquish in the creditor's favour all benefit from the principles recognized, and as I conceive properly recognized, by Lord *Cottenham* in the case of *Ex parte Holmes*. The debtor more than two years afterwards became bankrupt, and being indebted to the creditor in an amount exceeding that for which the surety was responsible, the whole was proved under the fiat by the creditor, who at a later period received from the surety full payment of that portion of the debt for which the surety was responsible.

The surety however, having taken a mortgage for his indemnity from the debtor, obtained also, after the bankruptcy, by means of that mortgage, payment in effect from the bankrupt's estate in full. In this state of things the assignees under the fiat now claim against the creditor who has not received 20s. in the pound on his

whole debt, the dividends on that part of his proof which represents the amount paid by the surety. How the case would have stood if the special agreement between the creditor and the surety that I have mentioned had not existed, or if the mortgage had been shown to be, as it has not been shown or alleged to have been, part of the same transaction as the engagement of suretyship, or previous to it or contemporaneous with it, or if the creditor who denies that he had and is not proved to have had notice before the bankruptcy of the mortgage, had had notice of it before the bankruptcy, it is unnecessary for me to say and I give no opinion. But circumstanced as the case actually is, I think the claim of the assignees not tenable. That the bankrupt was privy to the special agreement, that he was a party to the instrument in which among other things it was contained, makes the assignees' case neither better nor worse, nor do I see the applicability of the authority of *Wilson v. Greenwood*.

The agreement would I conceive have been clearly effectual and binding between the creditor and surety, if the surety had not by means of his mortgage or otherwise received payment from the assignees or from the bankrupt's estate, and if so, I do not see why their redemption of the mortgage, or the payment of the surety in any other way out of the bankrupt's estate, should vary the rights of the creditor; I think that they must take the surety's rights, if they take them at all, as he had them himself; that they cannot make any claim against the creditor's dividends which the surety could not have made; that he could not have made this claim, and that their petition must be dismissed.

I may observe that I have not stated the facts speci-

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fically as they appear, nor indeed do all the facts clearly appear. But I have meant to state, and I believe that I have stated, the case in a manner as favourable as possible to the petitioners. The debtor was in truth a firm of several persons in partnership together, and the mortgaged estate seems to have been the separate property of one of the firm, a circumstance which appears to me to make no difference at least in favour of the petitioners; I suppose that if it had been made originally to the respondents, it would not have affected their right of proof against the firm.

Ex parte FLINTOFF.—In the matter of THOMAS  
RODHAM.

Lincoln's Inn,  
July 17.

Members of a brewing firm execute a joint and several bond to the bankers of the firm, conditioned to be void, if the brewers paid the balance due at any time to the bankers when thereunto requested, such request to be in writing and to be sent to the bank. On the bankruptcy of one of the obligors, *held* that a request must have been made before the bankruptcy to entitle the bankers to prove.

THIS was an appeal from the rejection by the Commissioner of proofs tendered by the petitioner as public officer of the North of England Joint Stock Banking Company, under the following circumstances.

In June 1840, the bankrupt was a member and a director of a company, carrying on the trade of brewers at Tynemouth, in Northumberland, under the style of The Low Lights Joint Stock Brewery Company, of whom the banking company were the bankers.

In June 1843, the directors and some of the other

But, it appearing that part of the amount was due on bills of exchange, which had been dishonoured, and which the bankers had in writing, required the brewers to pay, without however referring to the bond, *held*, that this was a sufficient request.

The bills were drawn or accepted by the bankrupt and two other directors of the brewing firm, describing themselves as such directors, but not otherwise purporting to bind the firm. *Held*, that this created no separate liability of the bankrupt, entitling the bankers to prove on the bills alone.

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partners of the brewery company executed a bond for 10,000*l.* to the public officers of the banking company, in the following form: "Know all men by these presents, that we (here followed the directors names), directors of the Low Lights Joint Stock Brewery Company established in North Shields, are held and firmly bound as such directors of the said brewery company to *George Burdis*, of Newcastle-upon-Tyne aforesaid, banker, and *David Flintoff* of the same place, banker, registered public officers of the North of England Joint Stock Banking Company, in the penal sum, &c. for which payment to be truly made, we bind ourselves as such directors as aforesaid, and our heirs, executors and administrators by these presents, and that we (the names of other partners) are held and firmly bound to the said *George Burdis* and *David Flintoff*, as such registered public officers of the said North of England Joint Stock Banking Company, in the penal sum of 10,000*l.* of lawful money of Great Britain, to be paid to the said *George Burdis* and *David Flintoff*, or their certain attorney, executors, administrators or assigns, for which payment to be well and truly made we and any two or more of us bind ourselves, and each and every of us binds himself, our and each and every or any of our heirs, executors and administrators firmly by these presents."

The condition of the bond was as follows: "Whereas the said (here followed the partners' names) are partners or members of and in the said Low Lights Joint Stock Brewery Company, and the said company has had various cash dealings and transactions with the said joint stock banking company, and in order to induce the said

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company to continue such dealings, the said obligors, and any two or more of them, and each and every of them, have proposed and agreed to enter into the above written bond or obligation, to secure to the said banking company as well such sum or sums as is or are now and shall for the time being, and at any time or times hereafter, be due from the said brewery company, on the balance of their account with the banking company, and also such sum or sums of money as the said brewery company shall for the time being, or at any time or times hereafter, be indebted in or liable to pay such banking company upon or in respect of any bill of exchange, promissory note or other instrument," &c. It then proceeded to provide that the bond should be void if the directors, as such directors of the said Low Lights Joint Stock Brewery Company, or (the other partners parties to the bond), or any one, two or more of them, their or any one, two or more of their heirs, executors and administrators, should, when thereunto requested by the public officers or trustees or directors or manager or agent at North Shields for the time being of the banking company, or any one or more of them, such request to be made in writing, and sent by post to North Shields, or to the said Low Lights Joint Stock Brewery Company's usual or last place of business near Newcastle, well and truly pay or cause to be paid as well such sum and sums of money as should for the time being be due from the said Low Lights Joint Stock Brewery Company, either alone or in conjunction with any other person or persons, on the balance of their account with the said banking company, of whatever person or persons the same may for the time being be constituted, as also such

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sum and sums of money as the said Low Lights Joint Stock Brewery Company alone, or in conjunction with any other person or persons, should for the time being be indebted or liable to pay such banking company upon or in respect of any bill of exchange, promissory note, or other instrument, from or for whomsoever the same may have been received or taken by such banking company, and whether the same should be actually due or not, together with interest for all such sums of money from the time or respective times of the same being due and payable to the banking company, and all reasonable or accustomed commission and other legal charges, and from time to time and at all times thereafter well and truly indemnify and save harmless the banking company, and the members thereof, of, from, and against all manner of actions, suits, losses, costs, charges, damages, expenses and demands whatsoever which might happen or be occasioned by reason or on account of the said company accepting, paying or satisfying all or any such bill or bills of exchange, drafts, notes, securities or engagements, or lending, paying or advancing, or becoming in any manner liable to lend, pay or advance, any sum or sums of money to, for, or on credit of the said Low Lights Joint Stock Brewery Company, or otherwise on the account or for the use and benefit of the said company.

The directors of the brewery company also delivered to the banking company certain bills of exchange for various sums, amounting together to 5000*l.*, drawn by *John Rochester*, one of the directors of the latter company, upon the brewery company, and accepted by three of the directors of that company. Some of these bills on

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their becoming due were renewed, and the renewed bills were in the following form :—

“ Four months after date pay to my order 600*l.*, for value received.

“ *John Rochester.*

“ To the Low Lights Brewery  
Company, North Shields.”

And the acceptance was as follows :—

“ At London and Westminster Bank,  
London.

“ <i>T. S. Dobinson,</i>	}	Directors of Low Lights Brewery Company.”
<i>Thos. Rodham,</i>		
<i>Jos. Wilson,</i>		

The fiat issued on the 19th January 1844, when the banking company were holders of these bills. After the 12th June 1843, and before the issuing of the fiat, some of these bills were dishonoured, and notice of the dishonour of each bill was sent by the banking company to the brewery company, accompanied by a demand in writing of payment of the amount of each bill in the following form :—

“ We hereby give you notice, that (describing the bill) has been presented for payment and refused, and we require your payment of the same, with charges, amounting to £—.”

Each of these notices was signed by the agent at North Shields of the banking company, and addressed to the brewery company, and sent by post to their usual place of business at North Shields.

At the time of the bankruptcy there was due from the brewery company to the banking company, including their liability on bills which had been dishonoured, 569*l.* : 19*s.* 3*d.*



On the 11th March, the brewery company was dissolved.

The petitioner had claimed to prove against the estate of the bankrupt for the above-mentioned sum of 5691*l.* 19*s.* 3*d.* under the bond of the 12th June 1843, and also as a separate and distinct claim, in case the first should be rejected, for the same amount, upon the bills of exchange, on which he contended that the bankrupt was individually liable. The Commissioner had rejected both claims; the first on the ground that no request had been made, pursuant to the condition of the bond, before the date of the fiat; and the second on the ground that *Thomas Storer Dobinson* and others, who concurred with the bankrupt in signing the bills, were solvent, and that proof could not be made thereon against the bankrupt's separate estate.

Mr. *Swanston* and Mr. *Prior* in support of the petition of appeal. In the first place, no demand is necessary to give a right of proof upon the bond. The case that will be relied upon on the other side is *Ex parte Fairlie* (a), but that case is distinguishable from the present, for there it was expressly provided, that any debt existing previous to the demand should be and remain a debt, in like manner as if no covenant had been entered into for payment thereof, the covenant being intended only as an additional or collateral security. And the Lord Chancellor founds his judgment on this clause, saying, "It seems to be admitted, that if no alteration had been made by the covenant, or if it had been a joint and several covenant, 'that they should or would on demand well and truly pay, or cause to be

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(a) Mont. 17:

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paid, any debt that might be due to the firm;’ under such circumstances an actual demand would not be necessary. But it is contended, that in consequence of the separate liability which was created by this covenant, an actual demand would be necessary before an action could be brought under the covenant. This must depend upon the meaning of the parties, which can be correctly ascertained only by reference to the whole of the covenant. It proceeds in this way, ‘but any debt existing previous to such demand shall be and remain a debt, in like manner as if no covenant had been entered into for payment thereof, such covenant being intended only as an additional or collateral security.’ The expression, ‘any debt existing previous to such demand,’ would seem of itself to import an actual demand, but it does not stop there, the words are—any debt existing previous to such demand, shall be and remain a debt, in like manner as if no covenant had been entered into for payment thereof.’ From this it appears that an alteration was to be effected in the situation and liability of the parties by the demand, which must of course therefore mean an actual demand. I am of opinion then, that the debt continued a joint debt, in its original form, until an actual demand was made, and then upon that actual demand being made, it became a debt under the covenant.” Now there is no such proviso in this case, and therefore the authority of *Ex parte Fairlie* is not applicable. But moreover, as to a considerable part of the amount there was a demand within the meaning of the bond, for the demand accompanying the notice of the dishonour of the bills must be considered sufficient for this purpose.

If however it should be held that as to any part of

the amount, proof cannot be made upon the bond, then we submit that the Commissioner is wrong in deciding that the bills of exchange constitute joint debts, which cannot be proved against the bankrupt until the solvent partners have been resorted to. The acceptances do not purport to be made on behalf of the firm. There are merely the signatures of three persons, who describe themselves as directors of the company. These three persons do not constitute in themselves a partnership; and if only the bankrupt had signed, can it be doubted that he would have been separately liable? and if so, how can his liability be altered by the addition of two other names, when the three do not constitute a firm, and where the acceptance does not express any intention to be jointly liable? Besides, the firm is wrongly described in the acceptance as "The Low Lights Brewery Company," instead of the "Joint Stock Low Lights Brewery Company;" and when individual partners mean to bind the firm they must correctly describe it, *Kirk v. Burton* (a).

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The CHIEF JUDGE.—It is impossible to suggest any distinction between this case and *Ex parte Fairlie*, except as to the clause which has been referred to. That clause does not appear to me to make any substantial difference, and I think I should be differing from *Ex parte Fairlie* if I were to hold that a demand or request was unnecessary in this case. With regard to the bills of exchange, only one authority has been cited in support of the petition, and it does not appear to me to apply to this case. Being left to decide the question on principle, I must say that, according to my judgment, neither of these bills exhibits a separate liability on the part of the

(a) 9 M. & W. 284.

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bankrupt. If any authority the other way had been adduced I might have yielded to it; but there being none, I act upon my own opinion, which is clear as to these bills creating no separate liability on the part of the bankrupt. The only remaining point is as to the sufficiency of the notice. It is on this part of the case alone that I need trouble the counsel for the respondents.

Mr. *Anderdon* and Mr. *Bates* for the respondents. The notice does not refer to, or purport to be given in pursuance of, the bond, and cannot be held to be a compliance with the provision.

VICE-CHANCELLOR KNIGHT BRUCE, C. J.—In the argument for the respondents it is conceded that this is the several bond of the bankrupt, obliging him to make the stipulated payment upon the request of the public officers or trustees, or the directors or managers, or agent at North Shields, of the banking company, or one or more of them, such request being made in writing and sent by post to North Shields, or to the brewery company's usual or last place of business near Newcastle. The single question is, whether as to any debt to which this obligation applies there was such notice as was required. Now there were bills of exchange given for various parts of the debt due from the brewery company to the banking company:—bills at all events drawn or accepted by directors of the brewery company, and as such directors—for it is plain they were, and meant to act as, directors of this company. One of these bills became due after the execution of the bond, and was dishonoured; and then notice in writing was sent on behalf of the bank to the usual place of business of the

brewery company near Newcastle in these terms, i.e. (His Honour read it). My opinion is, that in each instance in which a bill became due, of the character that I have mentioned, and a notice of this kind was sent, although it may not refer to the bond, and although upon the bond or the bill the company may not be directly liable, such a notice is a request in writing, according to the just and reasonable interpretation of the provision.

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The ORDER was as follows:—

Declare that a notice in writing, from the North of England Joint Stock Banking Company, or any clerk or agent of that company, as such clerk or agent, in the following form: that is to say, “We hereby give you notice that (describing the particular bill of exchange) has been presented for payment and refused, and we require your payment of the same, with charges, amounting to £——,” or to that effect, applicable to any overdue bill of exchange drawn or accepted by any three directors of the Low Lights Joint Stock Brewery Company, for a debt due from the said brewery company to the North of England Joint Stock Banking Company, whether such brewery company was or was not directly liable upon such bill of exchange, was a sufficient request in writing to pay the amount of debt secured by such bill of exchange, within the meaning of the bond in the said petition mentioned, provided that such notice was before the bankruptcy delivered at or sent by the post to the last or usual place of business of the said brewery company at North Shields or near Newcastle-upon-Tyne,

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and refer it to the Commissioner acting in prosecution of the fiat to consider the nature of the claim to prove on the part of the said petitioner in the said petition mentioned, having regard to the above declaration. Reserve the consideration of the costs of both parties. Liberty to apply.

Lincoln's Inn,
July 30,
before Sir
George Ross.

Ex parte CHRISTIE.—In the matter of CLARKE and others.

R. M., who carries on business in partnership with J. C., J. P. and T. S., as bankers, signs one of the notes of the bank in this form: "I promise to pay, &c. For J. C., R. M., J. P. and T. S. R. M." On the firm becoming bankrupts, *held*, that the holder of the note might prove against R. M.'s separate estate. On a petition to expunge a proof upon a negotiable instrument, the respondent is not bound to produce the instrument, unless the petitioners have given him notice to do so, and the Court will not, in its absence, attend to a suggestion that it is not stamped, if that point is not raised by the petition.

THIS was a petition to expunge a proof which had been made by the respondent against the separate estate of *Richard Mitchell*, one of the bankrupts, who were bankers, upon a note of the bank.

The following was the form of the note:

Leicester and Lincolnshire Bank. £5 0 0

I promise to pay the bearer on demand five pounds here, or at Messrs. *Williams, Deacon, Labouchere, Thornton & Co.*, bankers, London, value received.

For *John Clarke, Richard Mitchell, Joseph Phillips, and Thomas Smith. Richard Mitchell.*

The note had been at first proved against the joint estate, but the respondent had obtained an order to withdraw it and to tender such proofs as he might be advised against the separate estate, without prejudice to the question whether he had or had not a right to prove against the separate estate.

Mr. Swanston and *Mr. Chapman* in support of the petition. There can be no doubt that the notes were intended to bind the firm. They are signed by one individual member of the firm for the firm, and on that

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account the terms of the promise are in the singular number, but there can be no doubt that the firm were bound; that the notes were issued as the notes of the firm and taken as the notes of the firm. And if that be so, it seems equally clear that the notes could not bind any partner separately. There is no ground for supposing an intention that the partner who happened to sign any note should be more bound than any other partner, and no such proposition would have ever been stated but for the decision in *Hall v. Smith* (a), on which the respondents rely. That was an action of assumpsit on note of a form similar to that now before the Court; the action was brought against the party alone, who signed the note for himself and two others, and he pleaded in abatement, and the plea was held bad. Now the Court there did not question that the firm were bound, for that point had been already decided in the affirmative by *Lord Galway v. Matthew* (b). But the firm being bound, it certainly seems difficult to hold that any partner was separately bound, for that would be to construe the note as containing two promises, which there is no pretence for doing; it would be introducing in fact the words "for myself," in addition to the other words in the note. Suppose a clerk had signed the note in this form, it could never have been contended that he was personally liable. A decision to that effect upon the construction of a deed was come to in *Wilks v. Back* (c). *Hall v. Smith* differs from this case, for there, from the nature of the instrument, each party having signed it, each promised to pay; but it cannot be contended here that each of the partners was bound separately by the note. The same answer may be given

(a) 1 B. & C. 407.

(c) 2 East, 142.

(b) 1 Campb. 403.

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to another case of *Clarke v. Blackstock* (a), which is cited in *Hall v. Smith*. There is also a case in America (the law of which country has the same origin with and bears a remarkable analogy to our own) of *Doty v. Bates* (b), containing an express decision on the point to the effect for which we contend. It appears therefore that the grounds on which *Hall v. Smith* was decided were not considered satisfactory, nor are they, whatever respect may be due to that decision, binding on this Court, unless it should be satisfied of their sufficiency. Besides, *Hall v. Smith* was a decision on a question of pleading, and did not really affect in substance the remedies of the parties, for if the plea in abatement had been allowed to prevail, and a joint action had been brought, execution might have been issued against any partner separately upon it, and the same result would have taken place.

But there is an objection of a different nature to this proof. If the note be a separate note of *Mitchell*, it is not within the licence granted to the firm by the Stamp Office, and therefore the note would require a stamp. As it cannot now be stamped, this objection alone is fatal to the proof. [Mr. Russell, for the respondents. What ground have you for saying the note is not stamped? I do not tender the note in evidence. You are seeking to expunge the proof, and I read the note from your petition, which raises no question as to the stamp or otherwise, except only as to the point of separate liability.] This is a question of proof. The note ought to be produced in Court. [Sir George Rose. Was any ob-

(a) Holt, N. P. C. 474.

(b) Johnson's Reports of Cases in the Supreme Court of Judicature in New York, vol. 11, p. 544.

jection taken before the Commissioner as to the stamp?]
We do not know whether it was or not, but we now take it and apprise the Court that this instrument is not stamped as required by law. That we apprehend is sufficient; there is no discretion in the Court upon the subject; the Court is bound by the statute. The respondents are bound to have the note here. [Sir *George Rose*. If you had given them notice to produce it that might be so.] We submit such notice was not requisite; they cannot maintain their case without producing the note. It is precisely the same as if they were now tendering a proof on the note.

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Sir *GEORGE ROSE*.—It appears to me, considering what has taken place before the Commissioner, and the case as it rests on the petition, that the petitioners are not in a condition to call for the note, unless they had given the respondent notice to produce it, and it does not appear to me that the duty is thrown on me to call for it. If it is here in evidence, of course I must take notice of it. At the same time, whatever may be the effect of your objection, you will not be prejudiced by the Order here, because it is still open to you to go again before the Commissioner, to consider what you had not an opportunity of considering before.

Mr. *Russell* and Mr. *Daniell* for the respondents, [Sir *George Rose*. There is one circumstance to which I wish to call attention. It appears to me not unimportant to observe, that the cases at law which have been mentioned went off upon the pleadings, and that the effect of bankruptcy would be to introduce quite a different state of things from that which would exist while the

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parties remained solvent. Granting that a separate contract is raised by force of the word "I" in the instrument, it is a contract which *Mitchell* obviously enters into in the character of a surety only. The consideration on the face of the instrument passes to the four. Now the contract is to pay the bearer on demand, and no demand is proved to have been made before the bankruptcy. There is a case of *Ex parte Fairlie* (a) upon the point.] The petition suggests nothing about suretyship, nor about demand; the only question raised is as to the construction of the note. Upon this there could be no reasonable doubt, independently of the case referred to of *Hall v. Smith*, which settles the case beyond controversy. The note contains the express promise of the individual partner; his being competent to bind and purporting to bind the four does not impair this separate promise, nor get rid of the separate liability which the partner contracts by using the word "I." It surely does not follow from the note being held to bind the firm that it cannot bind the partner. But it is useless to discuss the case on principle, for the decision in *Hall v. Smith* has stood unquestioned for twenty years, and is referred to in all text books as the leading authority upon the subject, and Mr. Justice Bayley has in his treatise explained most satisfactorily the grounds of the decision (b).

With respect to the point suggested by the Court, as to *Mitchell* being a surety for the firm, that is merely a question between him and his partners, the holder of the note has nothing to do with it. He is the party

(a) Mont. 17. See also *Rouse v. Young*, 2 Bli. 465; but see *Ex parte Whitworth*, 2 M. D. & D. 158.

(b) Bayley on Bills, 51.

whom the holder trusts, and to whose estate the holder has a right to look for payment. The instrument does not profess to place him in the character of a surety, and the holder need not inquire by whom the consideration money is received. Besides, the question of suretyship existed equally in *Hall v. Smith*. The bankruptcy makes no difference, for if the bankruptcy took away the right it would have an effect which bankruptcy is never held to have, that of taking away a right of action without giving a corresponding right of proof. If there was a separate right of action before the bankruptcy, there must be a separate right of proof after it.

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Mr. *Swanston* in reply was stopped by the Court.

Sir GEORGE ROSE.—The analogy which has been relied on at the bar between cause of action and proof, cannot I think be relied on without some qualification, since there are many instances in the administration of assets in bankruptcy, in which the legal effect of the legal contract is not carried out as it would be by action at law and execution. It really appears to me that the learned Commissioner, in arriving at the conclusion which he has arrived at in this case, has been more influenced by the decision in *Hall v. Smith* than, without presuming to say that it is not law, even its full legal operation, in my opinion, entitles it to, and certainly, without full attention to those principles, which in bankruptcy regulate the administration of assets.

It is I think impossible to deny that this note is both in its legal and equitable effect binding upon the four, and upon the estate of the four, by the signature of one partner, in the partnership style, for value admitted to

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be received by the firm,—it is I think at least difficult to say that it also raises a separate demand against each of the partners, or against any one of them severally other than *Mitchell*.

If it could be so put, then would it be the common case of election between the joint and all the several estates, where though at law, by action and execution, the creditor might have got both the joint and separate estates, here he would be put to his election. It is not however ventured to be put as a case in which the creditor may elect between the joint estate of *all*, or the separate estates of *all*, but it is put upon this,—that there is a proof against *Mitchell's* separate estate, and his separate estate exclusive of the other separate estates, by the force of his separate signature, thus throwing the whole burthen upon his separate estate only. *Hall v. Smith* has said that *Mitchell* could not have pleaded in abatement—be it so—but does that embrace all the question? *Mitchell* says, “I promise to pay bearer value received for self and partners, on demand,” if he is to be taken as so contracting exclusively, and upon his own assumpsit, as a surety for his firm, and for his other partners as included in the firm, they not also individually contracting for any separate right of action against them, surely the demand is an important ingredient in such his *Mitchell's* undertaking—and the reason is obvious,—because the demand being previously made upon him would give him the opportunity of setting himself right with his partners both jointly and respectively, is he not by the force of his exclusive contract a surety, and entitled to the protection which the demand is to be presumed as giving him? If this be so at law, from the nature of the contract, a fortiori, it should be so

in bankruptcy, for the insolvency having taken place before any such demand, it is now too late to arrange the equities between either the joint estate or the several estates of the partners, otherwise than by letting the burthen fall upon that, which having received the consideration, and, being bound by the contract, and having been intended so to be, ought in equity to bear it.

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I have looked at the deposition upon the proceedings, and it states no consideration for the note, it merely sets out the instrument, it states no demand upon *Mitchell*, and it therefore appears to me, as well from the legal effect of this instrument, and a fortiori from the proper direction of the proof, against the proper parties, and the proper estate, the liability attaches upon the joint estate of the four, and that as against *Mitchell's* separate estate it ought to be expunged.

Ordered accordingly. Assignees' costs out of the estate.

An appeal from this decision has been heard before the Lord Chancellor and stands over for a case to be sent to a court of law.



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ACT OF BANKRUPTCY.

1. An assignment of all the property of traders, in consideration of the assignees giving promissory notes to the traders' creditors, *held* not to be a *sale* within the principle of *Baxter v. Pritchard*, but an act of bankruptcy.

The possession taken under such a deed held to be incapable of creating reputed ownership within 6 *Geo.*

4. c. 16. s. 72, and, therefore, where both assignors and assignees became bankrupts, and the fiat against the assignees was issued first, *held*, that the question did not arise whether the assignees in bankruptcy of the assignors could be held, by relation, to have assented, before their appointment, to the assigned property being in the order and disposition of

the assignees under the deed, in analogy to the principle of *Ex parte Thomas and Fox v. Fisher. Ex parte Zwischenbart*, 3 M. D. & D. 671.

2. The following document held to be a mere agreement for a future tenancy, not an actual demise, and therefore properly stamped with a one pound stamp: "Memorandum of an agreement entered into this 31st Jan. 1840, between R. B. of the one part, and T. J. of the other part. The said T. J. hereby agrees to become the tenant of G. farm, at the customary time of entry, under the following conditions, viz. that the sum of 260*l.* annual rent shall be paid at the usual time for the house, premises, and lands, as agreed upon; and the said R. B. agrees to lay out in the improvement and alterations of the farm-house and new sheds a sum not exceeding 200*l.*, with the understanding that spars for rafters shall be found from the estate; cartage of all materials, except stones for walls, to be done or found by T. J. (Signed) R. B., T. J."

Held, also, that this agreement did not necessarily import, in point of law, that the year's rent was to be payable at the end of the year from the time of the entry; but that it might be shown from the contemporaneous or subsequent dealings of the parties that their understanding was that the rent should become payable at an earlier period.

It appeared in evidence that the

customary time of entry on farms in the neighbourhood was the 12th of May; and that the rents on the estate of which G. farm was a part, were always reserved payable at Michaelmas, the audit day being in January. T. J. entered on the farm in the spring of 1840, and continued in possession until 1842. In May 1842 he owed an arrear of rent amounting to 160*l.*, and on the pressing application of his landlord executed a warrant of attorney for 420*l.*, the amount of that arrear and of the current year's rent, upon the understanding that judgment was to be entered up thereon, and a *fi. fa.* delivered to the sheriff, but that it was not to be executed unless other writs against T. J. came to the sheriff's hands. In October 1842 application was again made to T. J. for payment of rent, he being expressly informed that another year's rent had then become due; and on that occasion he paid a sum on account, and undertook to pay the remainder before the Christmas following. In November 1842 other writs against T. J. having come to the sheriff's hands the *fi. fa.* issued upon the judgment on the warrant of attorney was executed:

Held, that under these circumstances there was sufficient evidence to warrant a finding that the year's rent became payable at Michaelmas.

That the giving of the warrant of attorney under the above cir-

cumstances was not an act of bankruptcy by *T. J.* as a procuring of his goods to be taken in execution. *Gore v. Lloyd*, 12 M. & W. 463.

3. In an action by the assignees of a bankrupt to recover property of the bankrupt, a letter written by him during his absence from home, stating that he was absent to avoid two writs that were out against him, is admissible evidence for the plaintiffs of an act of bankruptcy, without proof that there was in fact any writ issued, or any pressure of creditors.

In order to make the declaration of a bankrupt admissible evidence of an act of bankruptcy, it is not essential that the declaration and act should be contemporaneous. *Rouch v. Great Western Railway Company*, 1 Ad. & El. N. S. 51.

4. Where a trader had been summoned before a commissioner, under 5 & 6 Vict. c. 122. s. 11, and before the proper time had elapsed to constitute an act of bankruptcy within the meaning of the 13th section, a fiat was by mistake issued, which was afterwards annulled: *Held*, that the existence of this fiat was such an obstruction to the payment of the petitioning creditor's debt, that if he sued out a new fiat founded on the omission to pay, &c., according to the terms of the 14th section of the above act, the court would annul such new fiat.

Quære, whether payment of the

debt, after the issuing of the improperly issued fiat, would have constituted an act of bankruptcy under 6 Geo. 4. c. 16. s. 8. *Ex parte Musgrove*, 3 M. D. & D. 386.

5. A bill of sale by a trader of all his effects to a creditor as a security for an antecedent debt is an act of bankruptcy, although it does not purport to convey all his effects, and may have been executed in the hope of obtaining further advances from the creditor, and with the intention of continuing to carry on trade, and although advances may have been subsequently made, and no possession taken under the bill of sale until several weeks afterwards, during which time the trader carried on business as before. *Lindon v. Sharpe*, 7 Scott, N. R. 730.

(Notice of.)

See EXECUTION, 12—FRAUD, 2—NOTICE—PROOF, 6—RELATION.

ACTIONS.

See ASSIGNEES—COSTS, 4.

ADVERTISEMENT.

1. A petition to the Court of Review is comprehended within the words "other proceeding," contained in the 24th section of the 5 & 6 Vict. c. 122. Therefore, where a petition of the bankrupts to annul the fiat is not presented until after the expiration of twenty-one days after the advertisement of the bankruptcy in the Gazette, the Court of Review has no authority to entertain it.

The commencement of the proceeding by petition, within the meaning of the above section, is the presentation of the petition, and not the mere preparation of it by the solicitor, or a notice by the bankrupt to the commissioner disputing the validity of the fiat. *Es parte Thorold*, 3 M. D. & D. 285; 1 Phill. 239.

2. Where the bankrupt, on a petition to annul, admits all the requisites, he is not precluded by the twenty-fourth section of the 5 & 6 Vict. c. 122, from disputing the validity of the fiat on other grounds, although twenty-one days have elapsed, after the advertisement of the bankruptcy in the Gazette, before he presented his petition. *Es parte Phipps*, 3 M. D. & D. 488.

3. A petition to annul a joint fiat, presented by one of the bankrupts, must be served upon the other, although it only seeks to annul the fiat as regards the petitioner.

Where the objection arising from the want of such service was taken by the Court, and the petition was re-answered, that it might be served upon the other bankrupt, but before it was so re-answered and served, the time prescribed by the 5 & 6 Vict. c. 122. s. 24, for taking proceedings to dispute the fiat had run out: *Held*, that the Court had jurisdiction to entertain the petition, and to direct the assignees to admit, in an action brought against them by the bankrupt, that the action was

commenced within the time prescribed by the act: *Held*, also, that in such an action the bankrupt ought to be confined to such objections to the fiat as he would have been entitled to make under his petition, and that leave ought not to be given to him to amend the petition by introducing a statement which, with reasonable diligence, might have been introduced into it originally. *Es parte Veysey*, 3 M. D. & D. 420.

4. The twenty-fourth section of the Bankrupt Act, 5 & 6 Vict. c. 122, whereby the London Gazette, containing the advertisement of the adjudication of bankruptcy is made in certain cases conclusive evidence of the bankruptcy, does not apply to adjudications made before the 11th of November 1842, on which day the act came into operation. *Edwards v. Sherren*, 11 M. & W. 595; 1 Dowl. & L. 338.

5. An advertisement, notifying that a meeting of the creditors of the bankrupts would be held to assent to or dissent from the assignee compromising sundry suits pending in Chancery, in which the assignee was plaintiff, and certain persons, to be named at the meeting, were defendants, for the recovery of certain parts or shares in certain copper mines, *held*, insufficient, in not setting forth the names of the parties to the suits proposed to be compromised, there being six different suits, to all or any of which the advertisement might apply.

Quere, whether the Court will set

aside a compromise agreed to at a meeting properly convened, on the ground merely of its being an imprudent agreement, without fraud being suggested.

Neither the bankrupts nor their representatives have a right to appear on petitions relating to compromises of claims on behalf of the estate. *Es parte Magnus*, 3 M. D. & D. 693.

AFFIDAVIT.

1. *J. W.*, in support of a petition for a fiat, deposed that the alleged bankrupt was indebted to him, *J. M.* his copartner, (omitting the word "and") for goods sold and delivered by the deponent and his said copartner: *Held*, that the omission rendered the affidavit unavailable for the purpose of striking a docket; and the officer having permitted the docket to be struck, subject to the question of the sufficiency of the above affidavit, and having afterwards permitted a docket to be struck by another creditor: *Held*, that the latter creditor was entitled to the fiat. *Es parte Hill*, 3 M. D. & D. 51.

2. The Court refused to order an affidavit filed under 1 & 2 Vict. c. 110, to be taken off the file, on the ground that no fiat could issue upon it. *Es parte Cheese*, 3 M. D. & D. 79.

3. An affidavit in support of the petition must not be sworn before the petition is presented. *In re Dickson*, 3 M. D. & D. 686.

4. Where there are two petitions in the same bankruptcy, an affidavit intituled generally in the bankruptcy is regular; but, if it do not point with sufficient distinctness to the petition, in the matter of which it is proposed to read it, time will be given to file an affidavit in answer. *Es parte Musgrove*, 3 M. D. & D. 386.

5. Neither the Court of Review nor the Lord Chancellor has jurisdiction to allow a bankrupt's certificate, unless the bankrupt himself makes an affidavit of conformity. *Es parte Carruthers*, 3 M. D. & D. 269.

See also PETITION—PETITIONING CREDITOR, 6.

AGENT.

1. An agent has no right, without the authority of his principal, to overdraw a banking account. But if it appear that the agent has done so with the knowledge of his principal, the jury will be warranted in inferring from this, that the agent had, in fact, the requisite authority. *Pott v. Bevan*, 1 Car. & K. 335.

2. *M.* employed *R.* and Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident at Calcutta; *R.* and Co. accepted the employment, and wrote promising to credit him with the money when received. *R.* and Co. transmitted the bill in the usual course of business to *C.* and Co. of London, and by them it was for-

warded to India, where it was duly paid. *R.* and *Co.* wrote to *M.* announcing the fact of its payment, but never actually credited him in their books with the amount. The house in India failed.

Held, that *R.* and *Co.* were the agents of *M.* to obtain payment of the bill; that payment having been actually made they became ipso facto liable to him for the amount received; and that he could not be called on to suffer any loss occasioned by the conduct of their sub-agents, as between whom and himself no privity existed.

Where the judgment of the Court below is reversed in the House of Lords and the house pronounces the judgment which ought to have been pronounced in the Court below, the effect of such judgment is to give to the appellant the costs of the suit in the Court below, which he would have had there, had the proper judgment been pronounced in the first instance in that Court.

The house never gives costs against a party coming to sustain a decree in his favour. *Mackersey v. Ramsays*, 9 Cl. & Fin. 818.

And see PARTNER, 2.

AMENDMENT OF DECLARATION.

See COURT OF REVIEW.

ANNULLING FIAT.

1. Description of the bankrupt, as late of a place at which he carried on

business a year before the issuing of the fiat, he having carried on business since elsewhere, *held* insufficient, and the fiat annulled. To annul a fiat for insufficient description, it is not necessary that the existence of actual fraud or mischief should be shown. *Ex parte Lewis*, 3 M. D. & D. 93.

2. Order made for superseding a commission, and annulling a subsequent fiat, under the composition contract clauses, sections 133 and 134 of the 6 *Geo.* 4, c. 16. *Ex parte Clarke*, 3 M. D. & D. 595.

3. A docket was struck on the 22nd September, upon which a fiat was issued on the 25th September, but was not opened until the 11th October. In the meantime, between the 22nd and 29th September, the bankrupt received several debts due to him, and on the latter day filed his petition under the Insolvent Act, 5 & 6 *Vict.* c. 116, and obtained an interim order of protection, on the allegation that his debts did not amount to 300*l.* On a petition by the bankrupt to annul the fiat, on the ground of the delay in opening it, and also for the purpose of giving effect to the proceeding in insolvency, the Court declined to do either under the provisions of the 5 & 6 *Vict.* c. 122. s. 4, or the general provisions of the 5 & 6 *Vict.* c. 116. *Ex parte Whipple*, 3 M. D. & D. 449.

4. A petitioner seeking to annul the fiat for legal invalidity not patent upon the proceedings, must apply

before the certificate is allowed, or soon afterwards, or must account satisfactorily for his delay. *Ex parte Gregory*, 3 M. D. & D. 572.

5. A writ of fi. fa. having been lodged with the sheriff after a debtor had been declared bankrupt and assignees appointed, the sheriff returned "nulla bona." Before the return was made, the Court of Review had ordered that the fiat be annulled, if the Lord Chancellor should think fit; and after the return, the Lord Chancellor made an order accordingly: *Held*, that the return was not false, since the annulling of the fiat had not a retrospective effect; and that even if it had, the sheriff being a public officer, and having made the only return which he could at the time have made, ought to be protected. *Smallcombe v. Olivier*, 2 Dowl. & L. 217.

6. The fiat issued on February 23. Adjudication took place on the 27th, but was afterwards annulled. Further evidence in support of the bankruptcy was adduced before the commissioner, who declined adjudicating *de novo* upon the evidence. At the end of fourteen days from the issuing of the fiat, the bankrupt presented a petition to annul the fiat. *Held*, that the fiat ought to be annulled. *Ex parte Nicholson*, 3 M. D. & D. 295.

7. The rule that after a fiat has been annulled, the same petitioning creditor cannot sue out a new fiat against the same trader without the leave of the Court, does not render

it imperative upon the Court to annul the new fiat sued out without such leave. *Ex parte Thomas*, 3 M. D. & D. 307.

8. Debts had been proved, and real or leasehold property had been sold under a fiat, issued in June 1842, but the bankrupt had not obtained his certificate: *Held*, that a petition of a creditor, who had no lien and had not proved, presented in June 1844, to annul the fiat, for legal invalidity, the delay not being accounted for, came too late. *Ex parte Maxwell*, 3 M. D. & D. 708.

9. *Quære*, whether a person who has sued out a fiat, which is annulled for want of the legal requisites, may strike a fresh docket without the leave of the Court. *Ex parte Musgrove*, 3 M. D. & D. 386.

10. *Quære*, whether the Court can give validity to a fiat by annulling it as to one of the bankrupts, against whom it cannot be supported for want of the legal requisites. *Ex parte Veysey*, 3 M. D. & D. 420.

See ADVERTISEMENT, 3—Costs, 3, 10
—COURT OF REVIEW—FRAUD—
PETITIONING CREDITOR.

APPEAL.

See SPECIAL CASE, 2.

APPROPRIATION.

B. S. & Co., of Calcutta, having consigned certain goods to *G. B.* in England, on which they had a lien for the price, write him word that

they intend to draw in favour of *G. K. & Co.* for the balance of such shipments, and that they inclose bills of lading and policies of insurance for the goods in question; and they also draw a bill for the amount on *G. B.* in favour of *G. K. & Co.*, which they direct *G. B.* to place to account of shipments per *Gardner*. Before the goods reach England, *G. B.* becomes bankrupt, and the goods come to the possession of his assignees: *Held*, that the above expression in the bill and the letter amounted to a specific appropriation of the goods for the payment of the bill, and that the assignees were bound to account to *G. K. & Co.* for the proceeds. *Ex parte Gledstanes*, 3 M. D. & D. 109.

(Of Payments.)

See PROOF, 6.

ARREST.

See PROTECTION.

ASSIGNEES.

1. After a dividend has been declared, a party entitled in respect of a proof requests the assignees, by letter, to send him the amount of his dividend in a post office order, promising to send a receipt by return of post. The assignees send no answer. *Held*, that this is such a refusal to pay the dividend as entitles the creditor to an order upon petition at the costs of the assignees personally. *Ex parte Jackson*, 3 M. D. & D. 1.

2. Inquiry directed as to the conduct of an assignee in selling a reversionary

interest of the bankrupt, and as to his diligence in endeavouring to recover certain debts. *Ex parte Byron*, 3 M. D. & D. 55.

3. Form of Order, upon the petition of an assignee, who had in the name of an agent bid at a sale for a portion of the bankrupt's property, and then prayed to have the sale completed, or the property resold. *Ex parte Gore*, 3 M. D. & D. 77.

4. Form of Order in case of an assignee buying in, by mistake, a mortgaged estate of the bankrupt at a sale, under Lord *Loughborough's* Order. On such a sale, the assignees must have the conduct of it; and it is an improper practice for the sale to be conducted by the mortgagee. *Ex parte Cuddon*, 3 M. D. & D. 302.

5. An assignee removed at his own request, in order that he might bid at a sale of part of the bankrupt's estate. *Ex parte Perkes*, 3 M. D. & D. 385.

6. A petitioning creditor, who complains that the assignees have not complied with the commissioners' order, directing his bill of costs to be paid, although they have received monies applicable to that purpose, may apply to the Court of Review in the first instance, without the assignees being previously summoned before the Commissioner to produce their accounts. *Ex parte Rushworth* 3 M. D. & D. 318.

7. The owner of an estate took the benefit of the Insolvent Act, and afterwards became bankrupt. The

assignees in bankruptcy, without communicating with the assignees of the insolvency, in whom the estate was vested, sold it, pending a suit instituted by the vendors for a specific performance, the assignees of insolvency affirmed the sale. A specific performance was decreed.

A vendor filed a bill for specific performance, alleging that the defendant resisted it on the ground that the bankruptcy under which the plaintiff claimed was invalid. Neither allegation turned out correct, and though a good title was first shown in the Master's office, the decree was made without costs. *Sidebotham v. Barrington*, 5 Beav. 261.

8. The assignee of an insolvent debtor, under 1 & 2 *Vict.* c. 110, being unable to recover an estate belonging to and in the possession of the insolvent, owing to the existence of an old commission of bankrupt against the insolvent (which, however, had been long since abandoned, in consequence of all the creditors under it having compromised and released their debts), is entitled to maintain a suit in chancery against the insolvent and the assignee in bankruptcy, for the recovery of the estate, and for a receiver of the rents in the meantime. *Hollis v. Bryant*, 12 Sim. 492.

9. The 90th section of the Bankrupt Act, 6 *Geo.* 4. c. 16, applies to actions afterwards brought to trial by assignees acting under commissions which were issued before the passing

of the act, as well as to action by assignees under future commissions.

That section applies to actions of ejectment by an assignee. *Doe v. Liversedge*, 11 M. & W. 517.

11. An action of trespass, for seizing and taking the plaintiff's goods under a false and unfounded claim of a debt, *per quod* the plaintiff was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house, does not pass to the plaintiff's assignees on his bankruptcy. *Brewer v. Dew*, 11 M. & W. 625; 1 Dowl. & L. 383.

11. Mortgagor and mortgagee join in demising trade premises to a lessee, and at the same time the mortgagee and lessee enter into partnership by articles, according to which the demised premises are to be considered as partnership property. The lessee becomes bankrupt. *Held*, that the Court had jurisdiction to order the assignees to elect whether they would take or abandon the premises; and *semble*, that the Court has jurisdiction to order the assignees to pay the landlord's costs. But it will not so order, in general, nor unless under special circumstances. *Ex parte Norton*, 3 M. D. & D. 312.

12. A lessor is entitled, under the 6 *Geo.* 4. c. 16. s. 75, to an Order on the assignees to elect whether they will accept or decline a lease, notwithstanding the lease is in the hands of a third person, with whom it was

deposited by the bankrupt by way of equitable mortgage. *Ex parte Vardy*, 3 M. D. & D. 340.

13. The Court will only sanction a compromise made by the assignees with a claimant against the bankrupt's estate, subject to the approbation of the Commissioner. *Ex parte Marshall*, 3 M. D. & D. 448; and see ADVERTISEMENT, 5.

14. Where the Commissioners, at a meeting to audit the accounts of the assignees and declare a dividend, found a certain sum to be in the hands of the assignees, and declared a dividend accordingly; *semble* that each of the assignees is liable for the payment of the dividend, although the principal fund for that purpose had been received by and was then in the hands of only *one* of the assignees.

If an assignee objects to be so charged with money in the hands of his co-assignee, he should state his objection to the Commissioner at the audit, and not lie by until a petition is presented for the payment of the dividend. *Ex parte Ridley*, 3 M. D. & D. 4.

15. *A.*, being indebted to *B.*, absconds to America, upon which *B.* sends out a power of attorney to an agent to recover back what money he can from *A.* *B.*, hearing of a similar proceeding against *A.* by another creditor, sues out a fiat against *A.*, and is chosen one of his assignees; and afterwards *B.*'s agent in America obtains a sum of money from *A.* and remits it to *B.* in England: *Held*, that this money

was received by *B.* in his character of assignee; and that *B.*, having himself become bankrupt, might, under the 6 *Geo.* 4. c. 16. s. 105, be charged with the amount, together with interest at 5*l.* per cent., notwithstanding he had obtained his certificate. *Ex parte Ralph*, 3 M. D. & D. 331.

16. Where an assignee petitioned for the removal of his co-assignee on the ground of misconduct, which was denied by the latter, who recriminated, a special reference was directed to the Commissioner to inquire into and report the circumstances of the case. *Ex parte Oulton*, 3 M. D. & D. 336.

17. Where the sole assignee was the managing clerk of a solicitor, who had bought an estate of the bankrupt, and had neglected to complete the purchase, the Court ordered him to be removed, and that there should be a new choice. *Ex parte Ashmore*, 3 M. D. & D. 461.

18. Where one of several assignees is removed, it seems that the 25th and 26th sections of the 1 & 2 *Will.* 4. c. 56, require for the effectually vesting of the bankrupt's estate, that a new assignee should be appointed in his room. *Ex parte Daniel*, 3 M. D. & D. 612.

See BANKER AND CUSTOMER, 3, 4—
COSTS, 4—EVIDENCE—EXECUTION—HUSBAND AND WIFE, 2,
3—MESSENGER—MORTGAGE, 14—
PAYMENT INTO COURT—PETITION—PLEADING—RELATION—
WARRANT.

ASSIGNEE, OFFICIAL.

See OFFICIAL ASSIGNEE.

BANKER AND CUSTOMER.

1. Upon a loan of 28,200*l.* Cuba bonds by a customer to his bankers, the latter engaged to replace them, "at or within the expiration of three months, if he should require them to do so," and to deposit other securities for the performance of this engagement. After the expiration of the three months, without any requisition on the part of the customer, the customer consents to an exchange of other securities for those deposited by the bankers, without any new stipulation as to the period of redemption, and the bankers afterwards become bankrupt. *Held*, under these circumstances, that the time for replacing the Cuba bonds became indefinite, and that the bankers were not bound to replace them, until requested to do so; and that no such request having been made by the customer before their bankruptcy, the customer had no right to prove for the amount of the bonds under the fiat; and that the 6 *Geo. 4. c. 16. s. 56*, as to the proof of contingent debts, did not apply. *Ex parte Eyre*, 3 M. D. & D. 12; 1 Phill. 227.

A customer deposits a box containing various securities with his bankers for safe custody, and afterwards grants a loan of a portion of such securities to one of the partners in the banking house for his own private purposes, upon his depositing

in the box certain railway shares to secure the replacing of the securities thus lent. This partner afterwards, for his own purposes, and without the knowledge of the customer, subtracts the railway shares, and substitutes others of less value. *Held*, that, as the proceeds of the railway shares were not applied to the use of the partnership, the banking firm were not answerable for this tortious act of their partner for his own benefit, and consequently that the customer had no right of proof against the joint estate for the amount of the difference between the value of the shares subtracted and those that were substituted. *Ibid.*

Held, also, that the partners were not chargeable with any loss occasioned by this subtraction of the shares, on the ground of negligence; and that even if they were, it would be a claim for unliquidated damages, and therefore not proveable against the joint estate. *Ibid.*

2. A bill of exchange remitted by a customer to his bankers, and not due, but remaining in specie at the time of their bankruptcy, continues the property of the customer; and the same is the law as to a bank post bill, which the customer sends to the bankers, with a letter desiring them to place it to his credit, and to send him a receipt. *Ex parte Atkins*, 3 M. D. & D. 103.

3. By the custom of a bank, money paid in after banking hours was put into a separate place of deposit, and

entered in a counter book, but not carried to the customer's account till next day. Where a customer paid in bank notes after the banking hours, and the banker having before resolved not to open his bank again, placed the note in such separate place of deposit, without carrying it to the account of the customer, and next morning stopped payment, and became bankrupt, the bank note was held to remain the property of the customer. *Sadler v. Belcher*, 2 Moo. & Rob. 489.

4. Customers draw cheques on their bankers with whom their accounts are already overdrawn, and pay away the cheques, which come to the hands of other bankers. The second bankers remit to the first the cheques in a printed circular, desiring the amount of them to be paid to the London correspondents of the second bankers. Notwithstanding this circular, the custom between the bankers is to pay one another's cheques, so far as circumstances permit, by remittances of notes of the bankers sending the cheques, directly to those bankers, the understanding being however that the cheques should be paid on the day on which they are received, or the day following, either by such remittances, or by remittances according to the directions of the circular. The first bankers give the second credit in their books for the amount of the cheques, but become bankrupt three days after receiving them, and without having

made any payment or remittance in respect of them, knowing at the time of receiving the cheques that bankruptcy was inevitable. The assignees obtain payment from the customers of the full amounts of the cheques. *Held*, that the second bankers were entitled to payment in full of the same amounts out of the bankrupt's estate. *Es parte Cole*, 3 M. D. & D. 189.

5. Where short bills had been deposited with a country banker, and had been by him indorsed to his agent in London, who had a lien upon them for advances to the country banker: *Held*, on the bankruptcy of the country banker, that the proceeds of the bills, after satisfying the lien of the London bankers, ought to be distributed rateably among the depositors of the short bills. *Es parte Froggatt*, 3 M. D. & D. 322.

6. If the balance of a banking account remain overdue after the bankruptcy of the banker, his assignees are entitled to recover interest on such balance, as well for the period which has elapsed since the bankruptcy as for that which had elapsed before it. *Pott v. Bown*, 1 Car. & Kir. 335.

7. *R. M.*, who carries on business in partnership with *J. C.*, *J. P.* and *T. S.*, as bankers, signs one of the notes of the bank in this form, "I promise to pay," &c. "For *J. C.*, *J. P.*, *R. M.* and *T. S.*—*R. M.*" On the firm becoming bankrupt,

held, that the holder of the note might prove against *R. M.*'s separate estate. *Ex parte Christie*, 3 M. D. & D. 736.

See BILL OF EXCHANGE, 3—SET-OFF—TRUST, 2, 3.

BANK POST BILL.

See BILL OF EXCHANGE, 4.

BANKRUPT.

See EXECUTION, 5.

(*Last Examination of*.)

See CERTIFICATE, 2.

(*Service of Petition upon*.)

See ADVERTISEMENT.

(*Wife's Property*.)

See HUSBAND AND WIFE.

BANKRUPTCY.

1. Bequest of a share in certain trust funds in trust for *A.*, his executors, administrators and assigns, provided, that if *A.* should, during the life of *B.* or *C.* assign, charge, or otherwise dispose of his share in the principal or interest thereof, or attempt or agree so to do, or do any act whereby his share in the said monies, if payable to himself, or his executors or administrators, would become vested in some other person, then and in such case all his estate, right, title, and interest in such trust monies should absolutely cease and determine, and thereby and thereupon become absolutely forfeited;

and the trustees should thenceforward stand possessed of the shares or share so forfeited, in trust to pay, apply, and dispose of the annual produce thereof, during the lives of *B.* and *C.*, for the support and maintenance of *A.* and of his wife and family, or otherwise for his and their benefit, in such manner as the trustees should think proper, and after the death of *B.* and *C.* should settle and assure, or pay and apply, and dispose of the share so forfeited, in trust for, or for the benefit of *A.* and his family, in such manner as they should in their discretion think proper. *A.* assigned all his property to trustees for his creditors, and thereby committed an act of bankruptcy, and a fiat being issued against him, he was declared a bankrupt. *Held*, that upon the execution by or of the assignment, his share and interest in the trust monies became subject to the trust declared by the will for the benefit of *A.* and his wife and family; that *A.* was not of necessity entitled to any part of the income of the trust monies separately from his wife and children, but that any interest of *A.* in the trust monies not applicable for the support and maintenance of his wife and children, passed to his assignees on his bankruptcy. *Keareley v. Woodcock*, 3 Hare, 185.

2. After a demurrer had been put in to a bill, the sole plaintiff became bankrupt. Upon the motion of the defendant, who had demurred, the Court ordered that the assignee

should remedy the defect in the suit within a month, or that the bill should be dismissed without costs.

A party ordered to take a step within a fixed time, or that the bill should be dismissed, if desirous of an extension of the time, must give notice of motion so as to enable him to bring it on before expiration of the time fixed. *Lord Huntingtower v. Sherborn*, 5 Beav. 380.

See RELATION.

(*Bankruptcy, Evidence of.*)

See ADVERTISEMENT.

BARON AND FEME.

See HUSBAND AND WIFE.

BILLS AND NOTES.

1. *A.* and *B.*, who are partners, and *C.*, as their surety, give a joint and several promissory note to *D.*, by which they "jointly and severally promise to pay" to *D.* the amount of a partnership debt due from *A.* and *B.* The note is signed by *A.* and *B.*, not as individuals, but in their partnership firm, and by *C.* the surety. *Held*, that this note could not be treated as the several note of each one of the three, but as the several note only of the surety, and the joint note of *A.* and *B.*; and that on the bankruptcy of *A.*, who had survived his partner *B.*, the holder of the note could only rank as a creditor against the joint estate. *Ex parte Wilson*, 3 M. D. & D. 57.

A. survives *B.*, his partner, and

continues the business in the same firm of "*A.* and *B.*;" at the time of *B.*'s death a large balance was owing by them to their bankers, to whom *A.*, some time after *B.*'s death, indorses several bills in the partnership firm of *A.* and *B.*: *Held*, that it could not be inferred from this circumstance *alone* that the bills were so indorsed upon a partnership transaction of *A.* and *B.*, and that the bankers might prove the amount of the bills against the separate estate of *A.* *Ibid.*

2. *B. S. and Co.*, of Calcutta, having consigned certain goods to *G. B.* in England, on which they had a lien for the price, write him word that they intend to draw in favour of *G. K. and Co.* for the balance of such shipments, and that they inclose bills of lading and policies of insurance for the goods in question; and they also draw a bill for the amount on *G. B.* in favour of *G. K. and Co.*, which they direct *G. B.* "to place to account of shipments per *Gardner.*" Before the goods reach England, *G. B.* becomes bankrupt, and the goods come to the possession of his assignees. *Held*, that the above expressions in the bill and the letter amounted to a specific appropriation of the goods for the payment of the bill, and that the assignees were bound to account to *G. K. and Co.* for the proceeds. *Ex parte Gladstones*, 3 M. D. & D. 109.

3. A person deposits a bill of exchange for 12,000*l.*, payable to his

order, and also a warrant of attorney, executed by the acceptor of the bill, and expressed to be made to secure (among other things) the payment of the bill. The purpose of the deposit is, and is by the accompanying memorandum expressed to be, to secure the payment of another bill for 3000*l.*, accepted by the depositor. The deposited bill is not indorsed. On the bill for 3000*l.* becoming due, it is renewed, the deposited documents remaining in the possession of the holder of this bill, and a new memorandum of deposit being signed, which states the deposit to have been made on the day of the date of the new bill. This bill is renewed in the same way, and the transaction is repeated on several successive occasions, each transaction taking place through the agency of a person who is the solicitor of the acceptor of the deposited bill for 12,000*l.*, and who, as such solicitor, attested the execution of the warrant of attorney ; but no further notice of any of the transactions is given. *Held*, on the depositor becoming bankrupt,

That the deposit must be considered to have been made at the time of the first transaction, and not to have been made afresh at every succeeding one.

That the interposition of the solicitor of the party who executed the deposited warrant of attorney was not notice to that party, so as to take the security out of the reputed ownership of the depositor.

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That the circumstance of the warrant of attorney being expressed or executed for the purpose of securing the payment of a sum primarily secured by a negotiable instrument, did not supersede the necessity of notice as to the warrant of attorney.

That the deposit of the bill of exchange, though not indorsed, was good, without notice ; and that the deposit was entitled to have it indorsed and to the common equitable mortgagee's Order. *Ex parte Price re Gibbs*, 3 M. D. & D. 586.

4. A bill of exchange remitted by a customer to his bankers, and not due, but remaining in specie at the time of their bankruptcy, continues the property of the customer, and the same is the law as to a bank post bill which the customer sends to the bankers, with a letter desiring them to place it to his credit, and to send him a receipt. *Ex parte Atkins*, 3 M. D. & D. 103.

5. Assumpsit on a note alleged to have been made by defendant, payable to *W.* or bearer, and indorsed by *W.* to plaintiff. Plea, that before indorsing, *W.* became bankrupt, whereupon a fiat issued and assignees were appointed, &c., by reason whereof all *W.*'s interest in the note vested in the assignees ; and that the indorsement was not made, nor had the plaintiff any interest in the note before it was so vested.

Replication (under stat. 2 & 3 *Vict.* c. 29. s. 1), that the note was in-

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dorsed by *W.* to plaintiff, and, being so indorsed, was *bond fide* received by plaintiff before the fiat; that plaintiff had not, at the times of indorsement and receipt, notice of any act of bankruptcy committed by *W.*, and that the note was not indorsed or received by way of fraudulent preference. Rejoinder, that the note was not *bond fide* received by plaintiff before the fiat, in manner, &c. Issue thereon. *W.* had indorsed the note in blank, and delivered it, before the fiat, to his son, who delivered it to plaintiff, but this last delivery was not before the fiat. No *mala fides* appeared.

Held, that the issue, by its terms, raised the question whether plaintiff had personally received the note before the fiat, and that, he not proving such receipt, defendant was entitled to the verdict.

Also, that the issue was material, for that under the statute it is necessary to show an actual *bond fide* receipt of the note by some person before fiat; and, if the pleading avers such a receipt by *A.*, it is not sufficient to show that *A.* received the note *bond fide* after fiat, but that before fiat it was indorsed in blank to *B.*, from whom *A.* received it, and therefore that it was constructively indorsed to *A.* before fiat. *Green v. Steer*, 1 Ad. & Ell. N. S. 707.

See BANKER AND CUSTOMER—LIEN,
4 — PARTNER, 1 — PETITIONING
CREDITOR, 1, 2.

BOND.

A. and *B.* enter into a joint and several bond to *C.*, *D.* and *E.*; *C.* delivers the bond to *A.* (who was her son) for safe custody, and after for some time receiving the interest from *A.*, she and *D.*, another of the obligees, die. *B.*, one of the obligors, also dies, when his executors and *A.* make an arrangement together, without the privity of *E.*, the surviving obligee, and erase the name and seal of *B.* from the bond. *Held*, that this did not invalidate the bond as against *A.*; and that on his bankruptcy, the surviving obligee might prove for the amount of the principal and interest due upon the bond. *Ex parte Smith*, 3 M. D. & D. 378.

BOTTOMRY BOND.

See SHIP.

CERTIFICATE.

1. Certificate ready for allowance, but not allowed before 5 & 6 Vict. c. 122, came into operation: *Held*, sufficient under the new act, and allowed accordingly. *Ex parte Farly*, 3 M. D. & D. 65.

2. The Court declined allowing the certificate of a bankrupt who had passed his last examination before the forty-second day, and ordered another day to be advertized for his examination. *Ex parte East*, 3 M. D. & D. 321.

3. In order to induce a creditor to sign the certificate of a bankrupt, *A.* gave him an understanding that,

in consideration that the creditor would sell goods to the bankrupt, he, *A.*, would guarantee payment to a certain extent at any time during the dealings between him and the bankrupt.

Held, that the guarantee was void by sect. 125 of the Bankrupt Act, 6 Geo. 4. c. 16. *Hankey v. Cobb*, 1 Ad. & Ell. N. S. 490.

4. Where the fiat and proceedings were, before the passing of the act 5 & 6 Vict. c. 122, left in the possession of the sole assignee, who was not to be found, the Court ordered that the Commissioner should be at liberty to proceed without them in allowing the certificate. *Ex parte Baldwin*, 3 M. D. & D. 326.

5. A bankrupt, after the issuing of the fiat against him, but before the granting of his certificate, promised in writing to pay a debt due by him before his bankruptcy: *Held*, that this promise did not revive the debt, so as to enable the creditor to sue the bankrupt thereon in an action of *indebitatus assumpsit*. *Kirkpatrick v. Tattersall*, 1 C. & K. 577.

See AFFIDAVIT, 5—FUTURE DEBT—PETITION TO STAY CERTIFICATE.

CHEQUE.

See BANKER AND CUSTOMER.

CHOSE IN ACTION.

See HUSBAND AND WIFE—REPUTED OWNERSHIP.

COGNOVIT.

See EXECUTION, 8.

COMMISSIONERS.

1. *Semble*, the Court of Review has jurisdiction to direct references to the Commissioners. *Ex parte Gore*, 3 M. D. & D. 77.

2. *Quære*, whether a Commissioner of the Court of Bankruptcy is bound to obey an Order of reference of the Court of Review. *Ex parte Curlew*, 3 M. D. & D. 362.

3. The Commissioners are bound to execute Orders of reference made by the Court of Review; but neither that Court nor the Lord Chancellor can compel the Commissioners to execute such Orders. *Ex parte Steward*, 3 M. D. & D. 405.

4. Where an Order was made by a District Commissioner on a solicitor to pay a certain sum to the official assignee, without stating the special facts on which the Order was made, or that the party was a solicitor of the Court, or that he acquiesced in the Order: *Held*, that the Commissioner had no jurisdiction to make such an Order. *Ex parte Collins*, 3 M. D. & D. 604.

See COMMITMENT—MESSENGER—PROTECTION FROM ARREST.

COMMITMENT.

A warrant of commitment of a bankrupt for not satisfactorily answering questions put to him need not set out an examination previous to that upon which he has been committed, unless such examination taken together with the subsequent one is unsatisfactory.

A single Commissioner of a District Court of Bankruptcy has power to issue such warrant.

A bankrupt having been committed for not satisfactorily answering questions was again brought up, when the Commissioner refused to make any order, but afterwards issued a warrant for his detention, on the ground that his answers on the last examination were not unsatisfactory, the Court refused to grant a writ of habeas corpus, the warrant showing sufficient ground for his detention. *Ex parte Dauncy*, 1 Dowl. & L. 608.

See WARRANT.

COMPOSITION DEED.

See FRAUDULENT PREFERENCE, 4.

COMPROMISE.

See ASSIGNEES, 13—ADVERTISEMENT, 5.

CONFORMITY.

See AFFIDAVIT, 5.

CONTEMPT.

A petition for the committal of a person for publishing insulting observations on the Court of Review, and on parties engaged in litigation before it, with reference to proceedings on a particular bankruptcy, is properly intituled in the matter of such bankruptcy.

The Court of Review has jurisdiction to commit for such a publication, as a contempt, and may make the order for committal upon the petition

of the parties aggrieved, and may by such order direct the person committed to pay all petitioner's costs, charges, and expenses.

The publication of the observations respecting the petitioners in such a case was held to be, of itself, a contempt of Court, and the Court refused to discharge the person committed, until he apologized, as well with regard to the petitioners as with regard to the Court itself.

Held also, that an offer to prove the truth of the observations, if the petitioners would proceed upon them as a libel, was an aggravation of the contempt.

A petition on which judgment has been finally pronounced, but on which the Order has not been drawn up, held a pending proceeding, for the purpose of rendering the publication a contempt of Court, even if the actual pendency of a proceeding is requisite to give the Court jurisdiction to commit; but *semble* that such pendency is not requisite.

A compromise of a contest for the choice of assignees, by which the business of the bankruptcy was divided between two distinct firms of solicitors, who were to be jointly appointed solicitors to the fiat, strongly disapproved of by the Court. *Ex parte Turner*, 3 M. D. & D. 523.

CONTINGENT DEBT.

1. Upon a loan of 28,200*l.*, Cuba bonds by a customer to his bankers, the latter engaged to replace them

"at or within the expiration of three months, if he should require them to do so," and to deposit other securities for the performance of this engagement. After the expiration of the three months without any requisition on the part of the customer, the customer consents to an exchange of other securities for those deposited by the bankers, without any new stipulation as to the period of redemption, and the bankers afterwards become bankrupt: *Held*, under these circumstances, that the time for replacing the Cuba bonds became indefinite, and that the bankers were not bound to replace them until requested so to do; and that no such request having been made by the customer before their bankruptcy, the customer had no right to prove for the amount of the bonds under the fiat; and that the 6 *Geo.* 4. c. 16. s. 56, as to the proof of contingent debts did not apply. *Ex parte Eyre*, 3 M. D. & D. 12; 1 Phill. 227.

2. *A.* agreed to sell to *B.* for 4000*l.* a ship employed on a distant voyage when she should arrive at her port of discharge in the united kingdom, and *B.* agreed, within one month after her arrival, or within such further time as should be necessary for effecting the repairs and discharging the cargo, on the execution of a bill of sale of the vessel, to deliver to *A.* two promissory notes for the amount of the purchase money; in default of which *A.* meant to sell the ship and keep the proceeds in part of the pur-

chase money, *B.* undertaking to pay to *A.* any deficiency within one calendar month after such sale; and in case the vessel should be lost the agreement was to be void. On the 27th March the ship arrived, before which time *B.* became bankrupt. On the 31st March *A.* gave notice of her arrival to the assignees, who declined to complete the contract, and *A.* sold the ship for 2833*l.* *Held*, that the agreement amounted to a contract on the part of *B.* to pay a certain sum on a contingency, liable to be reduced on another contingency, and that *A.* could prove for the balance of the 4000*l.* after deducting the amount of the proceeds of the sale of the ship. *Ex parte Harrison*, 3 M. D. & D. 350.

3. *Covenant.* The declaration stated that the defendant effected a policy of insurance on his life, and assigned it to plaintiff to secure a sum of money lent by plaintiff to defendant, and that defendant had covenanted to pay the premiums on the policy: breach, that he had not so paid the premiums.

Plea, the defendant's bankruptcy after commission of the breaches.

Held, that the plea was no answer, as the defendant's liability to pay the premiums to the insurance office constituted no debt, either contingent or otherwise, between plaintiff and defendant, and was collateral to the debt, and not proveable under defendant's commission. *Toppin v. Field*, 3 Gale & Dav. 340,

COSTS.

1. A petitioner obtaining an Order of the Court for any purpose, which directs him to pay the costs of another party appearing on the petition, is bound, on the requisition of such party, to produce the Order to the Registrar, pursuant to the General Order of the 29th April 1844, for the purpose of his marking on it the date when it passed, preparatory to the issuing of a writ of *fiery facias* for the amount of the costs. *Ex parte Grimstead*, 3 M. D. & D. 683.

2. Where bills of costs of the solicitor to the fiat had been taxed and paid before 1835, and the assignees' accounts containing these payments had been audited and passed by the Commissioners, and one of the solicitors to the fiat and two of the assignees had since died: *Held*, that a petition for retaxation, presented in 1844, came too late, whether the case came within the act 6 & 7 Vict. c. 73, or not; as to which, *quære*.

As to other bills delivered in and before 1834, and paid without being taxed by the assignees, by payments on account, ending in 1834, *held*, that the statute did not prevent taxation, and that the petition was not too late. *Ex parte Woolston*, 3 M. D. & D. 702.

3. Under a fiat in bankruptcy, issued in the year 1840, *G.* was appointed official assignee, and received possession of the bankrupt's books, &c. On the 10th of December, 1841, the fiat was annulled by consent of the creditors, and the bankrupt de-

manded the restoration of his books: but this being refused, on the 4th of January, 1842, he commenced an action of trover against *G.* for their recovery. On the 25th of January a second fiat was issued against the plaintiff, and on the 12th of May the plaintiff was duly adjudged a bankrupt. On the 25th of May, *G.*, the defendant in the suit, was again appointed official assignee. On the 23rd of February the action was tried, and the plaintiff obtained a verdict. *Held*, that the defendant was entitled to stay the proceedings in the action, upon payment of costs down to the date of the second fiat in bankruptcy. *Ouchterlong v. Gibson*, 3 Dowl. N. S. 1; 1 Dowl. & L. 1.

4. An executrix brought an action of assumpsit for 4*l.* 1*s.* 1*d.*, in respect of a debt found by the testator's books to be due from the defendant. Before action the defendant alleged that he had a set-off, but he pleaded as to 2*l.* 15*s.* his bankruptcy; and as to the residue, non assumpsit; the plaintiff entered a nolle prosequi as to 2*l.* 15*s.*, but recovered a verdict for 1*l.* 6*s.* 1*d.* the residue. *Held*, that the cause of action having arisen in the county of Middlesex, and the debt being reduced below 40*s.*, the defendant was entitled to enter a suggestion upon the roll to entitle him to double costs of suit; and that his right to do so was not affected by the position of the plaintiff as executrix, nor by her ignorance of the bankruptcy of the defendant, nor

by the circumstance of the bankruptcy not having been put in issue. *Stikwell v. Bracker*, 3 Dowl. N. S. 251.

5. The plaintiffs recovered a verdict in an action of *assumpsit* on two bills of exchange for 68*l.* 6*s.* for damages and costs. After a fiat in bankruptcy had issued against the defendant, they signed judgment. Afterwards they proved under the commission for the amount of the bills of exchange, the Commissioners refusing to allow them to prove for the costs. The bankrupt never obtained his certificate, nor was any dividend paid under the commission. The plaintiffs subsequently sued out a writ of *sci. fa.* to revive the judgment, solely with the view of recovering the costs. The Court granted a rule to stay proceedings on the *sci. fa.* *Woodward v. Meredith*, 2 Dowl. & L. 185.

6. On taxation of costs, a charge for consulting counsel previously to presenting the petition, and a fee to a second counsel on the hearing, if the petition is one of a special nature, ought to be allowed. *Ex parte Ellis*, 3 M. D. & D. 600.

7. An application to review the taxation of an officer of the Court may be made by way of motion.

Assignees having the conduct of a sale under the usual Order, made on the petition of a vendor, having a lien for unpaid purchase money, are justified in taking the opinion of counsel on the conditions of sale, and will be allowed the costs of so doing,

out of the proceeds of the sale, although those proceeds may fall short of the sums due to the vendor. *Ex parte Lewis*, 3 M. D. & D. 173.

8. The provisions of the 3 & 4 Will. 4. c. 47. s. 8, enabling the Court of Review to refer bills of costs to be taxed by the Registrar, is confined to such bills as are directed to be taxed by the 1 & 2 Will. 4. c. 56. s. 5, and the directions of the last mentioned act apply only to "costs of suit between party and party in the Court of Review." Other bills of costs, therefore, must still be referred for taxation to a Master in Chancery. *Ex parte Glaister*, 3 M. D. & D. 253.

9. *Quære*, whether 5 & 6 Vict. c. 122. s. 19, (which gives the defendant costs in case the plaintiff should not recover the amount for which he filed an affidavit of debt,) applies to a case referred for arbitration. *Higginson v. Broadhurst*, 1 Dowl. & L. 490.

10. A trader, against whom a fiat has improperly issued, is requested by the petitioning creditor to consent to an order to annul, on payment of the costs, &c. of the application; the proposed Order not providing for the costs of annulling the fiat and incidental thereto. The trader does not object on the ground of this omission, but requires other and unusual words to be added to the proposed order, which the petitioning creditor declines inserting. *Held*, that this negotiation did not deprive the

trader of his costs, on his afterwards presenting a petition of his own to annul. *Ex parte Musgrove*, 3 M. D. & D. 386.

See AGENT, 2—CONTEMPT—INSPECTOR—ASSIGNEES, 6, 11—MORTGAGE, 13, 14, 15, 16, 17—OFFICIAL ASSIGNEE—VOLUNTARY DEED.

COURT OF REVIEW.

Declaration in case for maliciously suing out a fiat in bankruptcy against plaintiff. The count averred that the fiat was untenable, &c., and that such proceedings were thereupon had, that on, &c., it was duly ordered, to wit, by the Court of Review, that the fiat should be, and that the same then was, rescinded and annulled, and the proceedings on the said fiat were thereupon then wholly ended and determined. Plea, Not guilty.

On motion after verdict for plaintiff to enter a nonsuit on the ground that the order annulling the fiat was proved at the trial to have been the Lord Chancellor's, and not that of the Court of Review: *Held*, that the plea of Not guilty, under the New Rules, did not put in issue the annulling of the fiat, and therefore that the variance, if any, was no ground of nonsuit.

On motion to arrest judgment on the ground that the Court of Review had no authority, under 1 & 2 Will. 4. c. 50, to annul a fiat: *Held* (assuming this to be so), that the statement of an order by the Court of

Review, in the above count, might be rejected; and that the residue of the count was sufficient, after verdict.

Semble, that, if the objection on the face of the count would have been good on motion in arrest of judgment, the judge at nisi prius ought not to have permitted an amendment under stat. 3 & 4 Will. 4. c. 42. s. 23. *Atkinson v. Raligh*, 3 Ad. & Ell. N. S. 79. See COMMISSIONERS—CONTEMPT.

DEBT, FUTURE.

See FUTURE DEBT.

DECLARATION.

See COURT OF REVIEW.

DELAY.

See ANNULING, 2, 4, 8.

DEMAND.

See PARTNER, 3.

DEPOSIT.

See BILL OF EXCHANGE, 3—MORTGAGE.

DISCHARGE.

See PROTECTION FROM ARREST.

DISCLAIMER.

See OFFICIAL ASSIGNEE.

DIVIDEND.

1. After a dividend has been declared, a party, entitled in respect of a proof, request the assignees, by letter, to send him the amount of his dividend in a post office order, pro-

missing to send a receipt by return of post. The assignees send no answer. *Held*, that this is such a refusal to pay the dividend, as entitles the creditor to an order upon petition at the costs of the assignees personally. *Ex parte Jackson*, 3 M. D. & D. 1.

2. Where a creditor, through inadvertence, omits to prove at the final dividend meeting, the Court will allow him to call a fresh meeting for that purpose, at his own costs, and will rescind the former dividend, so, however, as not to disturb any payments made to the creditors who have already received it. *Ex parte Dilworth*, 3 M. D. & D. 63.

See ASSIGNEES, 14.

DOCKET.

J. W., in support of a petition for a fiat, deposed that the alleged bankrupt was indebted to him, *J. M.*, his copartner (omitting the word "and") for goods sold and delivered by the deponent and his said copartner: *Held*, that the omission rendered the affidavit unavailable for the purpose of striking a docket; and the officer, having permitted the docket to be struck, subject to the question of the sufficiency of the above affidavit, and having afterwards permitted a docket to be struck by another creditor: *Held*, that the latter creditor was entitled to the fiat. *Ex parte Hill*, 3 M. D. & D. 51.

See ANNULING, 9.

DUTY.

See STAMP.

EJECTMENT.

See ASSIGNEES, 9.

ELECTION.

See ASSIGNEES, 11, 12—*PROOF*, 5.

EQUITABLE MORTGAGE.

See MORTGAGE.

EVIDENCE.

1. Assumpsit by the surviving assignee of a bankrupt, under an English commission, against a debtor, a native of India, and resident within the jurisdiction of the Supreme Court of Calcutta. Plea, that the defendant had not undertaken or promised in the manner or form as the plaintiff, assignees as aforesaid, had complained against him. Two days after issue joined, the defendant gave notice that he intended to dispute the trading petitioning creditor's debt and bankruptcy. At the trial, copies of the proceedings in the Bankruptcy Court, the commission, adjudication and assignment to the plaintiff and his co-assignee, which purported to be certified by the clerk of the enrolments, and to be under the seal of the Court of Bankruptcy in England, pursuant to the 2 & 3 Will. 4. c. 114. s. 9, were given in evidence; but no proof was given that these copies were authentic, nor was the seal proved to be that of the Court of Bankruptcy in England. A verdict

was given for the plaintiff, liberty being reserved for the defendant to move for a nonsuit. A rule nisi was afterwards granted, and after argument made absolute, and the verdict set aside, and judgment of nonsuit entered for the defendant, on the grounds that there was no evidence of an act of bankruptcy, of trading subsequent to the passing of the 6 Geo. 4. c. 16, and that neither that act, nor the 2 & 3 Will. 4. c. 114, extended to India: *Held*, on appeal, affirming the judgment of the Court below,

That the plea of non-assumpsit put the bankruptcy and assignment at issue sufficiently without any notice.

That the form of the plea, "assignee as aforesaid," was not an admission of the plaintiff's title as assignee of the bankrupt, but only used in reference to the description the plaintiff had given of himself in the declaration.

That the statutes 6 Geo. 4. c. 16, and the 2 & 3 Will. 4. c. 114, made to facilitate the proof of bankruptcy and assignment in England, did not extend to the courts in India, and that in those courts such evidence of the bankruptcy must be given as would have been required to prove the fact, if no statutory regulations had been made. *Clark v. Mullick*, 3 Moore, 252.

2. Assumpsit against acceptor of a bill of exchange. Plea, that, before and at the time of the accepting, &c. a fiat in bankruptcy had issued

and was in prosecution against defendant, and defendant then owed plaintiff a debt proveable under the commission, and that defendant, in consideration that plaintiff would prove such debt under the commission, agreed to accept and accepted the bill in part payment of the debt so to be proved, whereby the bill was and is void. Replication, denying the acceptance in part payment of such debt. Issue thereon.

Held, that the statement in the plea did not oblige the plaintiff to prove the bill at the trial, nor entitle the defendant to offer evidence of it, without having given notice to produce. *Goodered v. Armerer*, 3 Ad. & Ell. N. S. 956.

See ACT OF BANKRUPTCY, 3—ADVERTISEMENT — EXECUTION, 7—PETITIONING CREDITOR, 1—PROTECTION FROM ARREST — VIVA VOCE.

EXAMINATION.

See CERTIFICATE, 2.

EXECUTION.

1. The assignees of a bankrupt are entitled to recover in trover goods bona fide seized by an execution creditor under a fieri facias on a judgment upon a warrant of attorney after a secret act of bankruptcy, but not sold until after the date and issuing of the fiat, and notice thereof; and the stat. 2 & 3 Vict. c. 29, does not protect such an execution. *Skey v. Carter*, 11 M. & W. 571.

2. Goods of one *M.* were seized on the 15th March (under a *fi. fa.* upon a judgment on a warrant of attorney), after a secret act of bankruptcy; a fiat issued against *M.* on the 13th April, and the goods were sold on the 2nd May. *Held*, that the execution was defeated by the bankruptcy. *Lackington v. M'Lacklan*, 5 Scott, N. R. 874.

3. The goods of one *H.* were seized under several writs of execution; *H.* having subsequently become bankrupt, and his assignees claiming the goods, an issue was directed under the interpleader act, the goods being sold and the proceeds paid into court to abide the event. In the result, four of the executions were set aside. *Held*, that the right of the assignees to the proceeds paid into Court was subservient to that of the other execution creditors, whose judgments were not impeached. *Goldschmidt v. Hamlet*, 6 Scott, N. R. 962.

4. The proceeds of the sale of goods under an execution on a warrant of attorney, invalid by reason of a prior act of bankruptcy under the 6 Geo. 4. c. 16. s. 10, become vested in the assignees for the benefit of the whole body of creditors, is subject however, while in the hands of the sheriff, to any writs of execution in adverse actions lodged with him before fiat issued. *Goldschmidt v. Hamlet*, 1 Dowl. & L. 501.

5. Where judgment has been entered up and execution issued on a

warrant of attorney, but a fiat in bankruptcy has issued against the defendant and is still in operation, he is not therefore disqualified by want of interest from moving to set aside the execution on the ground of bad faith, though the debt, warrant and judgment are unimpeached. *Pinches v. Harcoy*, 1 Ad. & Ell. N. S. 868.

6. Trover by the assignees of a bankrupt against the sheriff of Middlesex. Plea, that after the bankruptcy, and after the passing of the 2 & 3 Vict. c. 29, the plaintiffs, as assignees of the bankrupt, were possessed of the goods in question by reason of the relation of their title to the act of bankruptcy; that after the bankruptcy, and whilst they were possessed of the goods, and before the conversion in the declaration mentioned, one *W.* sued out a writ of *fi. fa.*, and delivered it to the defendants as sheriff, and that they, before the fiat, seized and took in execution the goods for the purpose of levying the debt, and thereby committed the said conversion; that the execution was really and *bona fide* executed before the fiat, and that at the time of executing it, the execution creditor had no notice of any prior act of bankruptcy by the bankrupt committed. Replication, that the bankrupt procured the said writ to be sued out, and caused the defendants to take the goods in execution, with intent to defeat and delay his creditors, and thereby committed an act of bankruptcy; that after-

wards, and after the said goods, which is the conversion complained of. *Held*, first, that the words "bona fide executed" referred to the execution creditor and the sheriff, and not to the bankrupt; and therefore that the replication did not amount to any argumentative traverse of that averment, but was good by way of confession and avoidance; secondly, that the replication was not bad in omitting to state in what the conversion consisted. *Quare*, whether the replication was not bad for duplicity, as stating a second conversion, but, *semble*, that the statement of the second conversion amounted merely to an informal new assignment. *Belcher v. Magnay*, 12 M. & W. 102; 3 Dowl. N. S. 441.

7. *Semble*, that where a creditor, who has obtained execution on a judgment on a warrant of attorney, brings an action against the assignees of a bankrupt to try the validity of an execution, it lies on him (the plaintiff) to show that the warrant was given in an action commenced adversely, if he relies on 1 Will. 4. c. 7. s. 7. *Linnit v. Chaffers*, 1 Dav. & Mer. 14.

8. Money levied under a cognovit not filed, and upon which no judgment has been signed within 21 days, is void as against assignees of an insolvent, although the cognovit was given in a suit commenced adversely, and although the proceeds of the execution are paid over to the judgment creditor before the insolvency. *Biffin v. Yorke*, 5 M. & G. 428.

9. In December, 1837, certain goods of one *Cox* were seized by the sheriff under a writ of *f. fa.*, and by him conveyed to the plaintiff by bill of sale, the goods remaining in *Cox's* possession under a secret arrangement between him and the plaintiff. In December, 1838, a fiat issued against *Cox*, under which he was duly declared a bankrupt. In August, 1841, the goods (which still remained in *Cox's* possession) were again seized by the sheriff under other writs of *f. fa.*, and by him sold, and the proceeds paid over under an indemnity to the assignees, who then for the first time asserted their right. In trover by the plaintiff against the sheriff, the jury having found that the goods were in the order and disposition of *Cox* as the reputed owner at the time of his bankruptcy, with the consent of the true owner: *Held*, that the sheriff was not under the circumstances precluded from setting up the title of the assignees as an answer to the action. *Leake v. Loveday*, 5 Scott, N. R. 908.

10. An irregular execution against the defendant was levied on the 1st of March. The sale took place on the 7th of March and thirteen following days. On the 14th of March a docket in bankruptcy was struck against the defendant, and notice thereof and of the act of bankruptcy committed was given the same day by the attorney of the petitioning creditors to the plaintiffs and to the sheriff. On the 15th of March a fiat issued against the defendant,

under which he was adjudged bankrupt, and assignees were appointed on the 12th of April. On the 13th of April the assignees gave notice to the sheriff that they claimed the proceeds of the sale; and on the 25th a rule was obtained on their behalf to set aside the judgment and execution for irregularity. The judgment roll was not carried in till the 19th of April. *Held*, that the motion was not too late. *Brooks v. Hodson*, 2 Dowl. & L. 256.

11. A writ of *fi. fa.* having issued against *A.*, one of two partners, under which the partnership property had been seized, a second writ of *fi. fa.* was issued against *A. B.*, and lodged with the same sheriff, but no actual entry or seizure took place under it before a fiat in bankruptcy issued against both partners. The sheriff having subsequently sold the partnership property, and satisfied both writs: *Held*, that there was no sufficient seizure under the second writ, within the meaning of the 6 Geo. 4. c. 16. s. 108, as against the assignees. *Johnson v. Evans*, 1 Dowl. & L. 935.

12. Trover will lie against a sheriff, who having seized goods after an act of bankruptcy, under a *fi. facias* issued on a judgment founded on a warrant of attorney, sells the goods after the issuing of the fiat. In trover by the assignees of a bankrupt, the defendant pleaded that the plaintiffs by relation of their title as assignees were entitled to the possession of the goods, that a writ of

fi. fa. was directed to the defendants as sheriff, and that before the fiat the defendants "executed and levied execution under the writ, and thereby committed the grievance, &c.", that the execution was *bond fide* levied at the time of executing and levying it. Neither the defendants nor the execution creditor had notice of a prior act of bankruptcy. Replication, that the writ of *fi. fa.* issued on a judgment entered up on a warrant of attorney, and that before the issuing of the *fi. fa.* the bankrupts committed an act of bankruptcy, and a fiat issued within less than two months of the execution and sale, and that after the fiat, and before the sale, the sheriff had notice of the act of bankruptcy and fiat, and that after such notice the defendants sold the goods, *quæ est eadem*, &c. *Held*, on special demurrer, that the replication was good by way of confession and avoidance. *Cheston v. Gibbs*, 3 Dowl. N. S. 420.

13. A judgment creditor, who, having taken the body of a bankrupt in execution before the bankruptcy, keeps him in prison till he is discharged by his certificate, cannot prove under the bankruptcy. *Ex parte Mudie*, 3 M. D. & D. 66.

Quære, whether a final judgment by default not obtained by collusion, but adversely, which could not have been disputed, if the debtor remained solvent, may be impeached under his bankruptcy, on a proof being tendered upon it. *Ibid.*

But if the judgment were obtained

under such circumstances as would have been a ground for the interference of a court of equity to restrain execution, those circumstances are a sufficient objection to the proof, although the debtor may have omitted to make a legal defence which he had to the action, and although (under such circumstances as those of the present case) nearly twenty years have elapsed since the judgment was obtained. *Ibid.*

See ACT OF BANKRUPTCY—NOTICE.

EXECUTOR.

See COSTS, 5.

EXECUTOR DE SON TORT.

See REPUTED OWNERSHIP.

EXPUNGING PROOF.

See STAMP, 1, 8.

FACTOR.

See LIEN, 2—INTERPLEADER.

FEME COVERTE.

See HUSBAND AND WIFE.

FIAT.

See ANNULING — FRAUD — PETITIONING CREDITOR, 6—VENUE.

FRAUD.

1. A joint creditor of *A.* and *B.* strikes a docket for a *separate* fiat against *A.*, and after the docket is struck, *A.* delivers to him certain bills of exchange, forming a portion of the *joint estate* of *A.* and *B.*, in

part satisfaction of his debt. *Held*, that the creditor did not thereby incur a forfeiture of his debt, under the 6 *Geo.* 4. c. 16. s. 8, and that the words of that section, "whereby such person may receive more in the pound than *the other creditors*," mean the creditors entitled to receive dividends under the particular bankruptcy; and that the property, to the payment, gift, or delivery of which the section is meant to relate, is property which forms a subject of distribution under the particular fiat. *Es parte Smith*, 3 M. D. & D. 144.

2. Where one of two partners, who was anxious to dissolve the partnership, procured a creditor to issue a joint fiat against the firm, and it appeared that the main object of the fiat was to dissolve the partnership, and that the division of the effects among the creditors, if an object at all, was so merely in a slight and inferior degree, and was a purpose only subsidiary to the other; the fiat was held to be issued under a false colour for a concealed object, and was ordered to be annulled at the costs of the petitioning creditor and the partner who induced him to issue it. *Es parte Phipps re Coulson*, 3 M. D. & D. 505.

3. *A.*, a trader in embarrassed circumstances, offered his creditors a composition of 7s. 6d. in the pound, which was refused by the majority, including *B.* *B.* filed an affidavit in the Court of Bankruptcy, and on the 13th of March served on *A.* a copy,

and a demand of payment, and he also served a notice on the auctioneer not to proceed with the sale. The goods were sold, and out of the proceeds a payment was made on the 5th of April to C. of the amount of the composition upon a debt due from A. to C. *Held*, a fraudulent preference. *Gibson v. Muskett*, 4 M. & G. 160.

Quare, whether, under the 1 & 2 Vict. c. 110. s. 8, the twenty days after service of the notice are to be reckoned inclusively of the day of service. *Ibid.*

The question whether a fraudulent preference was given appears to be one of law rather than of fact. *Ibid.*

A payment really and *bona fide* made is a payment made without the intention of its being reclaimed. *Ibid.*

4. In an action by assignees of a bankrupt to recover back money alleged to have been paid by the bankrupt to the defendant by way of fraudulent preference, in contemplation of bankruptcy, the judge, assuming that there had been such a degree of importunity on the part of the creditor as would under ordinary circumstances repel the presumption of the payment being voluntary, left it to the jury to say whether it was made in consequence of that importunity, or with a view to a fraudulent preference of the defendant. *Held*, that this was a proper direction. *Cook v. Pritchard*, 6 Scott, N. R. 34; 5 Man. & Gr. 329; and see *Pritchard v. Hitchcock*, 6 Scott, N. R. 851.

5. One *Martin* being in embarrassed circumstances, executed a deed of composition to secure to his creditors the payment of 7s. in the pound upon the amount of their respective debts. The defendants, who were creditors, refused to sign the deed until they had obtained from *Martin* a promise to give them security for the difference between the composition and the full amount of their demand; and afterwards, in pursuance of that agreement, *Martin* gave them his promissory notes payable to themselves or order. The defendants indorsed the notes, and paid them into their bankers at Leeds, to whom they were in the habit of indorsing all bills and notes received by them, and drawing generally on account. The notes were presented at maturity by the London correspondents of the Leeds bankers, and paid by *Martin*, who continued his dealings with the defendants down to the bankruptcy, (which took place about three years afterwards,) without ever complaining of the transaction, or attempting to set off the payments made in respect of the notes against the subsequent demands of the defendants upon him. There was no evidence to show the state of the account between the defendants and the Leeds bankers at the time of the payments, nor any evidence that *Martin* knew in what character the bankers who presented the notes held them. In an action for money had and received, brought by the assign-

nees of *Martin* to recover back the amount of these notes, it was left to the jury to say whether or not the payment was voluntary; and they were told, that if the payment was made to the bankers as agents only, it must be considered as voluntary, and that if they found the payment to be voluntary, and to have been made with a full knowledge of the circumstances, they must find for the defendants, otherwise for the plaintiffs. The Court directed a new trial, in order that the attention of the jury might be more precisely directed to the question, whether *Martin* knew the character in which the bankers presented the notes, as agents or as holders for value. *Gibson v. Bruce*, 6 Scott, N. R. 309; 5 M. & G. 199.

See BILL OF EXCHANGE, 3—LIMITATIONS, STATUTE OF, 2—PROTECTED TRANSACTIONS.

FRAUDULENT PREFERENCE.

See FRAUD.

FRIENDLY SOCIETY.

Country bankers, appointed by a friendly society to receive monies, and to transmit them to their London agents for the purpose of investment in the Bank of England to the account of the commissioners of the national debt, are not to be considered as appointed to an office in the society, within the meaning of the Friendly Society Act, 4 & 5 Will. 4. c. 40, s. 12; *Ex parte Whipham*, 3 M. D. & D. 564.

FREIGHT.

See SHIP.

FUTURE DEBT.

Plaintiffs, having taken *B.* in execution for a debt, discharged him upon the following undertaking of defendant: "In consideration of your discharging *B.* out of custody, I undertake that he shall pay the debt due to you by four half-yearly instalments," &c. *Held*, that the plaintiff might have proved the unpaid instalments under a fiat in bankruptcy against defendant, and that defendant's certificate was therefore a bar to an action upon the contract for instalments becoming due since his bankruptcy. *Lane v. Burghart*, 1 Ad. & Ell. N. S. 933.

GAZETTE.

See ADVERTISEMENT.

GUARANTEE.

A. guarantees to a banking company "all current obligations in their hands to which *B.* may be a party, and also all his future obligations and engagements that may come into their hands." *Held*, that the latter part of the guarantee as to the future obligations implied of itself a consideration, and did not require the specific statement of one in the body of the guarantee, according to the requisition of the Statute of Frauds, and that the banking company might therefore, on the bankruptcy of *A.*, prove for the amount of their ad-

vances to *B. subsequent* to the date of the guarantee. *Ex parte Littlejohn*, 3 M. D. & D. 182.

And see CERTIFICATE, 3.

HUSBAND AND WIFE.

1. The assignees of a bankrupt cannot maintain an action in their own names only for a chose in action belonging to the wife of the bankrupt before marriage, as a promissory note given to her *dum sola*. *Sherrington v. Yates*, 1 Dowl. & L. 1032, reversing *Yates v. Sherrington*, 11 M. & W. 42.

2. A testator devised and bequeathed two freehold houses to his daughter, her heirs and assigns, with all the furniture in one of the houses, "for her own sole use and benefit." *Held*, that these words applied to the furniture as well as the house, and that the daughter having, after the testator's death, intermarried with *K.*, who afterwards became a bankrupt, was entitled, as against the assignees, to the whole of the furniture for her separate use. *Ex parte Killick*, 3 M. D. & D. 480.

3. In a suit filed by the assignees of a bankrupt against the trustees of the bankrupt's marriage settlement and the wife of the bankrupt, for the purpose of recovering the fund, subject to the wife's equity, a decree was made at the hearing of the cause, the husband being absent from the record, by which it was referred to the Master to approve of a proper settlement for the wife. On the

cause coming on for hearing for further directions, the Court declined to proceed in the absence of the husband.

A trust for the wife's own use and benefit is not a trust for her separate use. *Beales v. Spencer*, 2 Y. & C. C. C. 651.

See BANKRUPTCY.

INDIA.

See EVIDENCE, 1.

INJUNCTION.

See LIEN, 6.

INSOLVENT.

See EXECUTOR, 8—ASSIGNEES, 7, 8—
PROTECTION FROM ARREST.

INSPECTOR.

In an order appointing an inspector, liberty was given to him to apply to the Court, or to the Commissioner. Costs of appointing an inspector do not, as of course, come out of the estate, on behalf of which he is appointed. *Ex parte Sanderson*, 3 M. D. & D. 300.

INSTALMENT.

See FUTURE DEBT.

INTERPLEADER.

1. *A.* consigned goods to *B.* as factor, who sold them to *C.* : *B.* having become bankrupt, his assignees sued *C.* for the price of the goods, which were also claimed by *A.* : *Held*, that *C.* was entitled to

the benefit of the Interpleader Act. *Johnson v. Shaw*, 4 M. & G. 916.

2. The goods of one *H.* were seized under several writs of execution; *H.* having subsequently become bankrupt, his assignees claiming the goods, an issue was directed under the Interpleader Act; the goods being sold and the proceeds paid into Court to abide the event; in the result four of the executions were set aside: *Held*, that the right of the assignees to the proceeds paid into Court was subservient to that of the other execution creditors whose judgments were impeached. *Goldschmidt v. Hamlet*, 6 Scott, N. R. 962; 1 Dowl. & L. 801.

See EXECUTION, 3.

JOINT DEBT.

See PARTNER.

JOINT FIAT.

See ADVERTISEMENT, 3.

JUDGMENT.

A judgment creditor, who, having taken the body of a bankrupt in execution before the bankruptcy, keeps him in prison till he is discharged by his certificate, cannot prove under the bankruptcy. *Ex parte Mudie*, 3 M. D. & D. 66.

Quære, Whether a final judgment by default, not obtained by collusion but adversely, which could not have been disputed, if the debtor remained solvent, may be impeached under his bankruptcy, on a proof being tendered upon it. *Ibid.*

But if the judgment were obtained under such circumstances as would have been a ground for the interference of a Court of Equity to restrain execution, those circumstances are a sufficient objection to the proof, although the debtor may have omitted to make a legal defence which he had to the action, and although (under such circumstances as those of the present case) nearly twenty years have elapsed since the judgment was obtained. *Ibid.*

See COSTS, 6—EXECUTION—PROOF, 5—RECEIVER—WARRANT OF ATTORNEY.

JURISDICTION.

See COMMISSIONER—VOLUNTARY DEED.

LACHES.

See ANNULING, 2, 4, 8.

LANDLORD.

See ASSIGNEES, 11, 12.

LAST EXAMINATION.

See CERTIFICATE, 2.

LIEN.

1. The bankrupts employed the petitioners as their brokers for the sale of East India produce, and the brokers accepted bills to a large amount in favour of the bankrupts, on the credit of goods deposited with them for sale, and of bills of lading for goods shipped and consigned from India to the bankrupts.

On the 14th October, the bankrupts, being then in full credit, proposed to the brokers to accept bills in their favour to the amount of 3000*l.*, and to induce them to do so, informed them that a cargo of oil was consigned to the bankrupts from Bombay by the ship *Majestic*, which they intended to place in the broker's hands for sale, and undertook to hand over to them the bill of lading when received. On the 24th Oct. a fiat is issued against the bankrupts, and the bill of lading comes to the possession of the assignees: *Held*, that the brokers were entitled to have the bill of lading delivered up to them, and had a lien upon the cargo of oil for their general balance. *Es parte Barber*, 3 M. D. & D. 174.

2. Under an arrangement between *A.* at Manchester, and *C.* at Liverpool, *A.* bought goods for *C.* in *A.*'s name, and consigned them for sale in *A.*'s name to the correspondents of *B.* in India. At the time of the arrangement and of the shipment of the goods *C.* was the factor of *B.* at Liverpool (which fact was known to *A.*), and advised *B.* of the shipments, and as to the advances *B.* might safely make thereon to *A.* *B.* had from time to time accounted with *A.* and handed over to him the balance of the proceeds of each shipment, after deducting commission, &c. *C.* having become bankrupt *B.* refused to pay over to *A.* the balance in his hands, claiming a lien thereon in respect of the debt due to him from

C., on the ground that the goods were the property of *C.* and not of *A.*, and alleging that the cause of dealing between *A.* and *C.* was a fraud upon *B.* *A.* having brought an action for money had and received against *B.*, the judge left it to the jury to say, first, whether, as between *A.* and *B.*, the goods were the property of *A.*; and, secondly, whether the transaction, as between *A.* and *C.*, amounted to a fraud on *B.*, productive of injury to the latter. The jury having found a verdict for *A.* for the amount of the balance in the hands of *B.*, the Court refused to grant a rule nisi for a new trial. *Scott v. Crawford*, 4 M. & G. 1031.

3. *B. S. & Co.* of Calcutta, having consigned certain goods to *G. B.* in England, on which they had a lien for the price, write him word that they intend to draw in favour of *G. K. & Co.* for the balance of such shipments, and that they inclose bills of lading and policies of insurance for the goods in question, and they also draw a bill for the amount on *G. B.* in favour of *G. K. & Co.*, which they direct *G. B.* to place to account of shipments per *Gardner*. Before the goods reach England *G. B.* becomes bankrupt, and the goods come to the possession of his assignees. *Held*, that the above expressions in the bill and the letter amounted to a specific appropriation of the goods for the payment of the bill, and that the assignees were bound to account to *G. K. & Co.* for the proceeds.

Ex parte Gledstones, 3 M. D. & D. 109.

4. *A. & Co.* and *B. & Co.* engage in an adventure to India and China upon the following terms, that 10,000*l.* was to be invested in India bills, the proceeds of which were to be remitted to China, *A. & Co.* giving instructions as to one half, and *B. & Co.* as to the other half; and the outlay of money to either party to be saved by *A. & Co.* negotiating their drafts upon *B. & Co.*, and receiving them till the funds came home. The 10,000*l.* was to be advanced by the parties in equal shares, but *B. & Co.*'s moiety was to be provided for by a bill drawn on them by *A. & Co.*, payable at six months, and *A. & Co.*'s moiety by another bill drawn by them on *B. & Co.* payable at four months. Bills and goods are accordingly remitted from India to China, where the same are realised by the agents of *A. & Co.*, and the proceeds invested by them in the purchase of other goods, one portion of which is consigned to *A. & Co.*, and the other to *B. & Co.*, in England. *B. & Co.* become bankrupt before their portion of the return proceeds arrive, and *A. & Co.* are obliged to pay the bill drawn by them for *B. & Co.*'s moiety of the 10,000*l.*: *Held*, that this was not such a joint adventure as to give *A. & Co.* a lien on *B. & Co.*'s portion of the return proceeds, for the amount of the bill. *Ex parte Gemmell*, 3 M. D. & D. 198.

5. A railway company contracted with *R.* that *R.* should build a bridge for the company on their railway: *R.* was to provide implements and materials; and, if the company's architect considered that *R.* did not proceed with proper expedition, the company, on seven day's notice, might employ other or additional workmen, and, in that case, might use the implements and materials of *R.*, which, for the time being, should be used by *R.* in or about the works, and *R.* was to repay all additional expenses. The company were to have a lien on the implements and materials which, for the time being, should be upon the ground whereon the bridge was to be built, as a security for the completion of the works; *R.* undertaking to execute such deeds as counsel for the company should advise for confirming the lien and security. A fiat in bankruptcy issued against *R.* on 31st July, on which day the company took possession of the implements and materials used by *R.* in building the bridge. On 1st August the company gave notice as provided in the contract. On 2nd August they commenced completing the bridge, and, in so doing, used some of the materials and detained the rest. *Held*, that the agreement was lawful, not being made in contemplation of bankruptcy.

That the company were not entitled to use the implements and materials till the expiration of the

seven days' notice, and that the previous use was a conversion.

That they were entitled, after the seven days, to use all implements and materials used by the contractor on any part of the works for constructing the bridge.

That they were entitled to a lien upon all such implements and materials so used as were upon any land possessed by the company, on which the building of the bridge was, in a popular sense, being carried on. But not a lien upon the materials of a temporary railway constructed for bringing articles to the bridge from an adjoining river, nor to a crane at the end of such temporary railway, not being on the company's land.

But that these last materials were liable to be used by the company as above.

That these rights of the company were not invalidated by the possession of the bankrupt, under stat. 6 Geo. 4. c. 16. s. 72, he being the true owner.

Nor by other implements and materials, so used, having been removed without any objection from the company's authority, the lien being a shifting one, and attaching to such articles as were brought from time to time, and ceasing as to such only as were removed.

Nor by the implements and materials not being scheduled.

The assignees of R. having brought trover against the company for all the implements and materials

above-mentioned, the defendants pleaded the contract specially, and alleged that the implements and materials were brought and used for the bridge, and were on the ground whereon the bridge was to be built; and that the defendants had possession by R.'s permission, and continued to possess under the lien. On replication *de injurid*: Held, that the defendants were entitled to judgment, although the facts did not bring all the articles to which the declaration applied within the lien, the plaintiffs not having new assigned.

The rules as to new assignments apply to trover as well as trespass. *Hawthorn v. Newcastle-upon-Tyne and North Shields Railway Company*, 3 Ad. & Ell. N.S. 734.

6. The principle that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors, for satisfaction out of the remainder of that fund, does not apply where that creditor obtains by his diligence something which did not, and could not, form a part of that fund. The Orphan Chamber of Batavia, being the executors of a foreign creditor in the island of Java, by their agent in Calcutta proved the amount of their whole debt against the estate of A. B., who had been declared insolvent under the Indian Insolvent Act, 9 Geo. 4. c. 73,

and after making such proof, and receiving the dividends upon the whole debt, instituted a suit in the island of Java, to recover a plantation or estate there, held by one of the insolvents as trustee for the firm of *A. B.* and *C. D.* in equal shares; to which suit the assignees of the insolvent appeared as defendants, but judgment was given in favour of the creditor, and for the sale of the estate for his benefit, the proceeds of which amounted to three-fifths of his whole debt. The assignees of *A. B.* filed a bill on the equity side of the Supreme Court at Calcutta against the agent of the foreign creditor resident within the jurisdiction, praying that the dividends might be refunded, and that the defendants might be restrained by injunction from receiving any further dividends until all the other creditors were put on an equal footing with the creditor at Java, the defendant demurred and obtained judgment against the assignees. *Held*, on appeal by the Judicial Committee, that the estate in Java, not passing to the assignees under the assignment, did not form any part of the fund that was available for the benefit of the general creditors, and that the creditor was therefore not bound to refund the dividends, nor ought to be prevented from receiving any future dividends, provided he did not receive more than 20s. in the pound upon his whole debt. But the bill having stated that the creditor had also instituted proceedings

against certain debtors of the insolvents at Bencoolen: *Held*, that the assignees were entitled, under the prayer for general relief, to an injunction to stay the receipt of further dividends until the proceedings at Bencoolen were abandoned. *Cockrell v. Dickens*, 3 Moore, 98.

7. A *cestui que trust*, entitled to monies payable out of a fund in the hands of trustees, is indebted to his bankers in a large amount, by which his account is overdrawn, and in consideration of not being pressed to reduce this amount, he agrees to give the bankers a lien on the monies coming to him out of the trust fund. He therefore addresses a note to one of the trustees, requesting and authorizing the trustee to pay to the credit of the account of the *cestui que trust* at the bank the monies payable to him out of the trust fund. The trustee is apprised of the arrangement between the parties. *Held*, on the *cestui que trust* becoming bankrupt, that the bank had a good lien, and that the authority given by the note was not countermandable. *Ex parte Steward*, 3 M. D. & D. 265.

8. *Scmble*, That the statute 2 & 3 Vict. c. 29, operates to protect a claim of general lien on the goods of a bankrupt coming into the hands of a party before the fiat without notice of an act of bankruptcy. *Bowman v. Malcolm*, 11 M. & W. 833.

See ASSIGNEES, 11, 12—BANKER AND CUSTOMER, 5—SHIP—TRUST, 5.

LIMITATIONS, STATUTE OF.

Indebitatus assumpsit against *J. and W.*; plea, the Statute of Limitations; replication, that the debt accrued within six years. The debt was originally contracted with *J., W. and S.*; and *S.* more than six years afterwards, and within six years of the action being brought, made a payment in respect of it to plaintiff. *S.* became bankrupt shortly after; and the jury found that he made the payment in fraud of *J. and W.*, and in expectation of immediate bankruptcy.

Held, that nevertheless the payment barred the operation of statute. *Goddard v. Ingram*, 3 Ad. & Ell. N. S. 889.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MESSENGER.

The assignees of a bankrupt are not bound to continue the services of a messenger appointed by the commissioners. *Robson v. Jonassohn*, 8 Scott, N. R. 35.

MISDESCRIPTION.

Description of the bankrupt as late of a place at which he carried on business a year before the issuing of the fiat, he having carried on business since elsewhere: *Held*, insufficient, and the fiat annulled. To annul a fiat for insufficient description, it is not necessary that the existence of actual fraud or mischief should be shown. *Ex parte Lewis*, 3 M. D. & D. 98.

MORTGAGE.

1. The bankrupts, being mortgagees of various policies of life assurance, of which the respective insurance offices had notice, deposit them with their bankers to secure the repayment of advances; but the bankers give no notice of such deposit to the different offices. *Held*, that the policies must be considered as in the order and disposition of the bankrupts within the 72nd section of the bankrupt act; and that the same principle applied to one of the policies, which was effected with a mutual assurance company,

A. writes word to *B.* that he has "inclosed the particulars of certain title deeds of property, which he has deposited with *B.* for the security of a debt," and in the schedule inclosed, among other entries, is the following: 9000*l.* buildings, houses, &c. at *Titherington*." *A.* sends *B.* a box containing the deeds and other securities, which *B.* does not examine until after *A.*'s bankruptcy, when he finds that the only deed relating to the *Titherington* estate is an old paid off mortgage. *Held*, nevertheless, that the letter and schedule, taken together, created an equitable charge on the *Titherington* estate. *Ex parte Arkwright*, 3 M. D. & D. 129.

2. There must be some actual deposit to constitute an equitable mortgage. An order on a third party to deposit a lease, when executed, is not sufficient. *Ex parte Perry*, 3 M. D. & D. 252.

3. Where a petition was presented for the common equitable mortgagee's order, supported by evidence that was not satisfactory to the Court, and the Court referred it to the Commissioner to inquire into the circumstances of the deposit: *Held*, on the Commissioner finding in favour of the petitioner's claim, that the petitioner was entitled to the rents from the date of the order of reference. *Ex parte Smith*, 3 M. D. & D. 680.

4. A mortgagee is entitled to tack one mortgage to another on his petition for a sale, if the assignees decline an offer made by him to abandon all right of proof on their releasing the equity of redemption in both mortgages.

Seemle, that he would be so entitled whether such offer were made or not, and that the right of tacking is the same whether the party seeking relief is the mortgagor or the mortgagee.

A mortgagee assigns the mortgage debt and executes a bond to the assignee for the amount, but by a memorandum of even date with the assignment he declares that he advanced to the assignor part of the debt only, and will stand possessed of the remainder (specifying the amount) in trust for the assignor. The security proving deficient, *Held*, that the transaction was in substance a submortgage, giving the assignee a priority as to the amount advanced by him. *Ex parte Berridge*, 3 M. D. & D. 464.

5. On a petition of an equitable mortgagee, where the deposit was made only a month before the issuing of the fiat, the Court directed an inquiry, upon the request of the assignees. *Ex parte Clouter*, 3 M. D. & D. 187.

6. Order giving legal mortgagee leave to bid, made after the sale nunc pro tunc. *Ex parte York*, 3 M. D. & D. 329.

7. On a sale under the fiat of premises mortgaged by the bankrupt, leave given to the assignees to fix such reserved bidding as the Commissioner might approve of. *Ex parte Lackington*, 3 M. D. & D. 331.

8. Assignees are entitled to have the direction of the Court, with regard to the rights of parties claiming to be equitable mortgagees of property of the bankrupt; and are therefore entitled to their costs out of the mortgaged estate, although they have been requested to concur in a sale, without a petition being presented. *Ex parte Stevens*, 3 M. D. & D. 317.

9. *Quære*, whether a security by way of conveyance to a trustee on trust to sell and pay out of the proceeds the sum secured, is a legal mortgage within Lord Loughborough's order. *Ex parte Barnett*, 3 M. D. & D. 662.

10. Where there was a sufficient part performance to take a parol contract for sale out of the Statute of Frauds, and the purchaser became bankrupt: *Held*, that the vendor wishing to have effect given to his lien for unpaid purchase money, was

entitled to have his costs out of the estate sold. *Ex parte Cooper*, 3 M. D. & D. 717.

11. A mortgagee of a policy of assurance creates an equitable sub-mortgage of it by deposit, and becomes bankrupt. No notice of the original mortgage is given to the office, nor is any notice of the sub-mortgage given either to the office, or to the mortgagor. *Held*, that the submortgage was invalid as against the assignees. *Ex parte Wood*, 3 M. D. & D. 315.

12. An equitable mortgagee of an estate, of which the bankrupt is legally the owner, may prove without giving up his security, if the estate subject to the mortgage be so incumbered that the bankrupt would have no beneficial interest in it, if the mortgage were removed.

A partnership, consisting of a father and a son, is dissolved; the father equitably mortgages an estate of his own to secure a debt due from the son separately, and afterwards dies indebted, jointly with the son, to an amount more than sufficient to exhaust his assets, including the mortgaged estate, even if the mortgage were removed. The estate descends to the son, who becomes bankrupt. *Held*, that the mortgagee might prove and keep his security. *Ex parte Turney*, 3 M. D. & D. 576.

13. The costs of an application of a mortgagee for leave to bid at the sale will not be allowed out of the

proceeds, unless the assignees consent. *Anon.* 3 M. D. & D. 339.

14. As a general rule the assignee of a bankrupt stands exactly in the place of the bankrupt as to third persons.

The provisional assignee of a bankrupt mortgagor is not entitled to his costs against the mortgagee, the plaintiff, in a foreclosure suit. *Hughes v. Kelly*, 2 Con. & Law. 223.

15. Where deeds were deposited, with a written memorandum, to secure the debt of two partners, and after the death of one it was verbally agreed that the deposit should be extended to secure the separate debt of the surviving partner: *Held*, that the costs should be apportioned as to the sums respectively due from the joint and separate estate, in the one case as on a deposit with a written agreement, and in the other as on a deposit by parol. *Ex parte Ford*, 3 M. D. & D. 457.

16. Form of order on petition of equitable mortgagee by deposit with written memorandum, where the memorandum has been lost. *Ex parte Rogers*, 3 M. D. & D. 297.

17. Where, in June 1837, the bankrupt verbally deposited a bundle of deeds with the petitioner to secure a debt, which the petitioner believed were all the deeds relating to the property in question; and in August 1843, only two days before the issuing of the fiat, the bankrupt deposited two other material deeds relating to the property, and there was no affi-

davit on the part of the assignees or the bankrupt impeaching the validity of the latter deposit; the Court would not impute to it the character of a fraudulent preference, and made the common order as in the case of a verbal deposit.

The last deposit was accompanied with the following memorandum: "The deeds are placed in the hands of *F. G.*" *Held*, that this did not entitle the petitioner to an order as on a deposit, accompanied with a memorandum in writing. *Es parte Gillett*, 3 M. D. & D. 458.

See ASSIGNEES, 4, 12—BILL OF EXCHANGE, 3—COSTS, 8—PAYMENT INTO COURT.

MOTION.

See COSTS, 8—SPECIAL CASE, 2.

NOTICE.

1. Notice of a docket having been struck is not "notice of a prior act of bankruptcy," within the meaning of the 2 & 3 Vict. c. 29. *Hocking v. Acraman*, 12 M. & W. 170; 3 Dowl. N. S. 434.

2. Notice of the issuing of a fiat in bankruptcy against one *R.* was sent by post to *S.* and *T.*, the attorneys of the defendants at Liverpool, on the 23rd of January. *S.* and *T.* had a box at the post-office in which their letters were placed, and which box was fetched from the post-office by one of their clerks about nine o'clock every morning. There was

no evidence to show the precise time at which *S.* reached his office on the morning of the 24th, but supposing him to have pursued his usual course, he would arrive there at about ten minutes before ten, and at half-past ten *T.* arrived there and found his partner with the letter open before him. At twenty minutes past ten, on the morning of the 24th, a sheriff's officer called at the house of *R.* for the purpose of executing a writ of *fi. fa.* at the suit of the defendants, and saw a female servant of *R.*, who told him her master was from home. The officer, without saying anything, left a man with the warrant to wait *R.*'s arrival; *R.* came in a little before eleven o'clock, when the officer's follower first made known his business. In trover by the assignees of *R.* against the defendants, the question was, whether the communication of the notice to *S.* and *T.* or the levy was first in point, of time. The jury having found for the defendants, the Court refused to disturb the verdict, holding that the notice took effect only from the reading of the letter, and the levy from the first entry of the officer for the purpose of seizing, and that the jury might, under the circumstances, reasonably infer from the evidence that the levy took place first. *Bird v. Bass*, 6 Scott, N. R. 928.

3. Knowledge by a creditor that a bill of sale comprised all the debtor's property, *Held* sufficient notice to

him that it was an act of bankruptcy. *Lindon v. Sharpe*, 7 Scott, N. R. 730.
 See BILL OF EXCHANGE, 8—EXECUTION, 12—FRAUD—MORTGAGE, 11—PROOF, 6.

NOTICE TO PRODUCE.

See EVIDENCE, 2.

OFFICIAL ASSIGNEE.

1. The appointment of an official assignee is a matter peculiarly within the discretion of the Commissioner, with which the Lord Chancellor will not interfere, unless under very strong circumstances. Where there-for an estate had been nearly wound up before the passing of the act 5 & 6 Vict. c. 122, and it was stated that all that remained to be got in consisted of the damages recovered in an action by the creditors' assignees, who had expended large sums out of pocket in the prosecution of the action, the Lord Chancellor refused to direct that no official assignee should be appointed. *Ex parte Bowker*, 3 M. D. & D. 324.

2. Upon an application by an official assignee to be indemnified by the creditors' assignee from the costs of a pending action, in which the name of the official assignee had been joined as a co-plaintiff without his consent, the Court offered him a reference to the Commissioner to inquire whether the action was for the benefit of the estate, and that being declined, ordered the petition to stand over till the result of the ac-

tion was known. Upon the case coming on for further directions, after a verdict obtained against the assignees, it appearing that the creditors' assignee had offered his personal indemnity for the costs of the action a year before the petition was presented, which was declined by the official assignee, the Court, upon the renewal of that undertaking by the creditors' assignees, dismissed the petition, with costs. *Ex parte Turquand*, 3 M. D. & D. 475.

3. An official assignee made defendant to a foreclosure suit, as representing the interest of a mesne incumbrancer who had become bankrupt, *Held*, not to be entitled to his costs from the plaintiff, although he disclaimed absolutely at the hearing. *Clarke v. Wilmot*, 1 Phill. 276.

ONUS PROBANDI.

See EXECUTION, 7.

ORDER AND DISPOSITION.

See REPUTED OWNERSHIP.

PARTNER.

1. *A.* and *B.*, who are partners, and *C.*, as their surety, give a joint and several promissory note to *D.*, by which they "jointly and severally promise to pay" to *D.* the amount of a partnership debt, due from *A.* and *B.* The note is signed by *A.* and *B.*, not as individuals, but in their partnership firm, and by *C.* the surety. *Held*, that this note could not be treated as the several note of each

one of the three, but as the several note only of the surety, and the joint note of *A.* and *B.*; and that, on the bankruptcy of *A.*, who had survived his partner *B.*, the holder of the note could only rank as a creditor against the joint estate. *Ex parte Wilson*, 3 M. D. & D. 57.

2. Two of six partners, who had given a confidential clerk a general authority in writing to sign bills and notes on behalf of the firm, direct the clerk to sign four promissory notes in the name of the firm, payable respectively to one or the other of the two partners, who claimed to be creditors of the aggregate firm in respect of an excess of capital, advanced by them for the purposes of the partnership. The two partners afterwards indorse the notes to a separate creditor for a private debt of one of the two. *Held*, that although as between these two partners and the other members of the firm, the notes were unjustifiably created and possessed by the two, yet in the absence of all fraud or connivance in the transaction, by the party to whom the notes were indorsed, the firm of the six were liable for the amount, and that on the bankruptcy of the firm the holder of the notes had no right to prove the amount of them against the joint estate. *Ex parte Bushell*, 3 M. D. & D. 615.

3. Members of a brewing firm execute a joint and several bond to the bankers of the firm, conditioned

to be void if the brewers paid the balance due at any time to the bankers when thereunto requested, such request to be in writing and to be sent to the bank. On the bankruptcy of one of the obligors, *held* that a request must have been made before the bankruptcy to entitle the bankers to prove.

But, it appearing that part of the amount was due on bills of exchange, which had been dishonoured, and which the bankers had in writing required the brewers to pay, without however referring to the bond, *held*, that this was a sufficient request.

The bills were drawn or accepted by the bankrupt and two other directors of the brewing firm, describing themselves as such directors, but not otherwise purporting to bind the firm. *Held*, that this created no separate liability of the bankrupt, entitling the bankers to prove on the bills alone. *Ex parte Flintoff*, 3 M. D. & D. 726.

4. A customer deposits a box containing various securities with his bankers for safe custody, and afterwards grants a loan of a portion of such securities to one of the partners in the banking-house for his own private purposes, upon his depositing in the box certain railway shares, to secure the replacing of the securities thus lent. This partner afterwards, for his own purposes, and without the knowledge of the customer, subtracts the railway shares, and substitutes others of less value.

Held, that as the proceeds of the railway shares were not applied to the use of the partnership, the banking firm were not answerable for this tortious act of their partner for his own benefit, and consequently that the customer had no right of proof against the joint estate for the amount of the difference between the value of the shares subtracted and those that were substituted. *Ex parte Eyre*, 3 M. D. & D. 12; 1 Phill. 227.

Held, also, that the partners were not chargeable with any loss occasioned by this subtraction of the shares, on the ground of negligence; and that even if they were, it would be a claim for unliquidated damages, and therefore not provable against the joint estate. *Ibid*.

5. *A.* and *B.*, who are partners, and *C.*, as their surety, give a joint and several promissory note to *D.*, by which they "jointly and severally promise to pay" to *D.* the amount of a partnership debt, due from *A.* and *B.* The note is signed by *A.* and *B.*, not as individuals, but in their partnership firm, and by *C.* the surety. *Held*, that this note could not be treated as the several note of each one of the three, but as the several note only of the surety, and the joint note of *A.* and *B.*; and that, on the bankruptcy of *A.*, who had survived his partner *B.*, the holder of the note could only rank as a creditor against the joint estate. *Ex parte Wilson*, 3 M. D. & D. 57.

A. survives *B.*, his partner, and continues the business in the same firm of "*A.* and *B.*;" at the time of *B.*'s death a large balance was owing by them to their bankers, to whom *A.*, some time after *B.*'s death, indorses several bills in the partnership firm of *A.* and *B.* *Held*, that it could not be inferred from this circumstance alone, that the bills were so indorsed upon a partnership transaction of *A.* and *B.*, and that the bankers might prove the amount of the bills against the separate estate of *A.* *Ibid*.

6. The rule that a joint creditor cannot prove against one of his debtors, if another be solvent, is not confined to cases of partnership, but applies to co-contractors generally. *Ex parte Field*, 3 M. D. & D. 95.

7. Two of the members of an iron company carry on a distinct trade as bankers, but are not the ordinary bankers of the company. They make advances at interest to the company, for the purpose of relieving it when it is in a state of difficulty and pressure, and without taking or asking for any security, and under such circumstances as to lead to the inference that the advances would not have been made, had not the bankers been partners in the iron company. On the company becoming bankrupt, and there being no evidence, except such as was furnished by the nature of the transaction itself, that the character of a banking transaction belonged to it: *Held*, that the advances,

though made by bankers, were not made by them in their character of bankers, and were consequently not dealings between trade and trade, giving a right of proof against the estate of the company, the use of the facilities afforded by a trade not being necessarily a use of them in the trade itself. *Ex parte Williams*, 3 M. D. & D. 481.

See ASSIGNEES, 11—BANKER AND CUSTOMER, 7—EXECUTION, 10—PROOF, 1, 3—TRUSTEE, 2, 3.

PAYMENT BONA FIDE.

See FRAUDULENT PREFERENCE.

PAYMENT INTO COURT.

A. and *B.* insured, in their joint names, certain leasehold premises which *A.* had mortgaged to *B.*, and *B.* paid the premium on the insurance, and the policy was delivered to him. Afterwards the premises were destroyed by fire; and then *A.* became bankrupt, and the assignees prevailed on the insurance company to pay the money due on the policy to them; and they afterwards paid it into the bank to the credit of the accountant in bankruptcy. *B.* filed a bill against the assignees, praying that the money received from the company might be applied in satisfaction of his mortgage debt. The answer of the assignees tended to impeach the mortgage on the ground of usury. The Court, however, ordered them to pay the amount of the money into Court. *Rogers v. Grazebrook*, 12 Sim. 557.

PAYMENTS, APPROPRIATION OF.

See PROOF, 6.

PENDING PROCEEDINGS.

See CONTEMPT.

PETITION.

1. Signature of the London agent of petitioners residing in Scotland declared to be sufficient, on the agent undertaking to be answerable for costs. *In re Topping*, 3 M. D. & D. 93.

2. A petition signed by only one of several assignees cannot be received, unless it is served upon the other assignee. *Ex parte Braden*, 3 M. D. & D. 614.

3. On a petition to stay the bankrupt's certificate, the Court will not grant the petition for further time to file affidavits in reply, unless in the course of the hearing there appears to be just ground for granting such indulgence. *Ex parte Aloop*, 3 M. D. & D. 180.

See ADVERTISEMENT, 3, 5—AFFIDAVIT—PETITIONING CREDITOR, 3—TRUST, 6.

PETITIONING CREDITOR.

1. Where a petitioning creditor's debt consists of a certain principal sum and interest, but, by reason of its insufficiency, another debt is substituted for it under the 6 Geo. 4. c. 16. s. 18, it is sufficient to constitute such second debt a debt "not anterior to the former," that the prin-

capital sum was due before the accruing of the substituted debt, although the interest thereon may have been accruing up to a period subsequent thereto.

The proof of a petitioning creditor's debt may be received in evidence without its having been inrolled, provided the handwriting of the petitioning creditor be proved, and the deposition be produced from the original proceedings under the fiat.

Semble, that where a creditor proves under a fiat in bankruptcy for a debt due on bills of exchange of which the bankrupt is the drawer, it is not necessary for him to aver in his deposition that the bills were duly presented, and that notice of their dishonour was given to the bankrupt. *Fletcher v. Manning*, 1 Car. & Kir. 350.

2. A petitioning creditor had sold the bankrupt goods, in payment for which he took three bills of exchange accepted by the bankrupt, which the creditor negotiated, and which were not in his hands nor due at the time he issued the fiat. The Commissioner expunged the proof of his debt, on the ground that the bills were not in his possession at the time of the bankruptcy. *Held*, that an order might be made, under the 18th section of the 6 Geo. 4. c. 16, for the substitution of the debt of another creditor. *Ex parte Smith*, 3 M. D. & D. 341.

3. A petition to substitute a new

petitioning creditor's debt must be served upon the petitioning creditor, although his debt has been expunged, and although the petition does not pray costs against him. *Ex parte Ward*, 3 M. D. & D. 24.

4. An order by the Court of Review, substituting another debt in lieu of that of the petitioning creditor, stated that the Court "doth declare that the debt of the said T. R. (the petitioning creditor), &c. is an insufficient debt to support the fiat, &c.; and it appearing that the debt of the said petitioners, proved by them under the said fiat, &c., was incurred not anterior to the said debt of the said T. R. &c." An action having been subsequently brought by the assignees, the order was amended by the Court of Review, on the eve of a new trial, by introducing a recital contained in the petition upon which the order had been made, "that the said petitioners had duly proved a debt under the said fiat;" but no statement to that effect was inserted in the mandatory part of the order: the amendment was made without notice to the defendant.

Held, that it was not necessary to give notice of the amendment to the defendant.

Held, also, that the amended order must be taken to operate from the date of the original order, and not from the date of the amendment.

But held further, that such amended order was insufficient, inasmuch as it did not allege, as required by the

statute, that the debt of the petitioners had been proved prior to their petition. *Brancker v. Molyneux*, 4 M. & G. 226.

5. A joint creditor of *A.* and *B.* strikes a docket for a separate fiat against *A.*, and after the docket is struck, *A.* delivers to him certain bills of exchange, forming a portion of the joint estate of *A.* and *B.*, in part satisfaction of his debt: *Held*, that the creditor did not thereby incur a forfeiture of his debt, under the 6 Geo. 4. c. 16. s. 8, and that the words of that section, "whereby such person may receive more in the pound than the other creditors," mean the creditors entitled to receive dividends under the particular bankruptcy; and that the property, to the payment, gift or delivery of which the section is meant to relate, is property which forms a subject of distribution under the particular fiat. *Ex parte Smith*, 3 M. D. & D. 144.

6. The Commissioners have power to dispense with the attendance of the petitioning creditor at the opening of the fiat.

The circumstance that the affidavit of debt was sworn before the solicitor to the petitioning creditor, held not sufficient ground for annulling the fiat; but it is an improper practice, and if it become general may be hereafter considered sufficient ground. *Ex parte Wright*, 3 M. D. & D. 320.

Quære, whether rent covenanted to be paid by a lease made during the trading, but falling due after the

trading has ceased, can constitute a good petitioning creditor's debt. *Ex parte Veysey*, 3 M. D. & D. 420.

See ASSIGNEES, 6.

PLEADING.

1. Assumpsit against acceptor of a bill of exchange, stating an indorsement by *S.* the drawer, to one *R.*, and by *R.* to the plaintiff.

The defendant pleaded, sixthly, in effect, that he accepted the bill in question for the accommodation of *S.*, the drawer, to enable him to deposit it with *R.* as a collateral security for a debt due to *R.* from *S.*; that *R.* took it on those terms; that *S.*, before the bill became due, paid *R.* part of that debt, and tendered the residue; that *R.* refused to receive the money tendered, kept the bill, and indorsed it to the plaintiff as a mere trustee, *R.* and the plaintiff conspiring and colluding to cheat the defendant: *Held*, on demurrer, that the injury was a good replication to this plea, and the plea contained merely matter of excuse.

The defendant pleaded, seventhly, in effect, that the plaintiff had been twice bankrupt, and obtained his certificate each time, but that his estate under the second bankruptcy had not paid 15s. in the pound, and that the bill was indorsed to him after his second certificate: *Held* good, by the Court of Queen's Bench on special demurrer.

Held bad, by the Court of Exchequer Chamber, reversing the judg-

ment in *B. R.*, because it did not state that the assignees had interfered, or required the defendant to pay the amount to them.

The plea stated the plaintiff became and was a bankrupt; but did not state any act of bankruptcy on which the commission or fiat was founded: *Held* sufficient, on special demurrer, by the Court of Queen's Bench.

After judgment for the plaintiff in the Court of Error, the Court of Queen's Bench allowed the plaintiff to enter a retraxit for the defendant of a plea which involved an issue in fact, and which had been left on the record, and carried up in the transcript, for the sole purpose of explaining the record, which would have otherwise been unintelligible. *Herbert v. Sayer*, 2 Dowl. & L. 49.

2. A plea (in assumpsit) setting out three commissions of bankrupt against the plaintiff, one fiat and two discharges under insolvent debtors' acts, and alleging that the plaintiff's estate did not on any occasion produce 15*s.* in the pound, is bad for duplicity.

The Court permitted the defendant to amend on payment of costs, but refused to allow him to plead the various bankruptcies, &c. in several pleas. *Alexander v. Townley*, 5 M. & G. 300.

3. *A.* in 1837 bought goods of *B.*, and allowed *B.* to remain in possession of them up to 1839, when *B.* became a bankrupt. *B.*'s assignees

made no claim, and *B.* retained possession of the goods until 1841, when the sheriff under a *fi. fa.* against *B.* seized and sold the goods: after the sale *B.*'s assignees gave notice of their claim to the sheriff, who, upon receiving an indemnity, handed over the proceeds to them. In trover, brought by *A.* against the sheriff, *held*, that under the plea of not possessed, the sheriff might set up the title of the assignees. *Leake v. Loveday*, 4 M. & G. 972.

4. Declaration in trover by assignees of a bankrupt stated that *M.* and *H.*, the bankrupts, before their bankruptcy were lawfully possessed of certain goods; that before the bankruptcy they came to the possession of the defendants; and that the defendants, knowing the goods to belong to the plaintiffs as assignees, after the bankruptcy converted them. A separate commission issued against *M.* alone on the 7th of November; on the 8th the goods were sold by the defendant as sheriff; on the 9th a joint commission issued against *M.* and *H.*, under which the plaintiffs were appointed assignees; and the plaintiffs afterwards, and after the goods were delivered to the purchasers, demanded them of the defendants, who refused them: *Held*, first, that the sale, and not the demand and refusal, constituted the conversion; secondly, that the allegations of the declaration, that the plaintiffs were possessed of the goods as assignees of both bank-

rupts, and that the defendants converted the goods after the bankruptcy, were not supported by the evidence. *Edwards v. Hooper*, 11 M. & W. 363.

See COSTS, 5—COURT OF REVIEW—

EVIDENCE, 1, 2—EXECUTION, 6, 9, 12—LIEN, 5.

POLICY OF ASSURANCE.

The bankrupts, being mortgagees of various policies of life assurance, of which the respective insurance offices had notice, deposit them with their bankers to secure the repayment of advances; but the bankers give no notice of such deposit to the different offices: *Held*, that the policies must be considered as in the order and disposition of the bankrupts, within the 72d section of the Bankrupt Act; and that the same principle applied to one of the policies, which was effected with a mutual assurance company. *Ex parte Arkwright*, 3 M. D. & D. 129.
See CONTINGENT DEBT—MORTGAGE, 11—REPUTED OWNERSHIP.

POOR, GUARDIAN OF.

See PROTECTED TRANSACTIONS.

PRACTICE.

See PLEADING—COSTS.

PRINCIPAL AND AGENT.

See AGENT.

PRINCIPAL AND SURETY.

See SURETY.

PRIVILEGE.

See PROTECTION FROM ARREST.

PROMISSORY NOTE.

See BILLS AND NOTES—PARTNER, 1.

PROOF.

1. Upon a loan of 28,200*l.* Cuba bonds by a customer to his bankers, the latter engaged to replace them "at or within the expiration of three months, if he should require them to do so," and to deposit other securities for the performance of this engagement. After the expiration of the three months, without any requisition on the part of the customer, he consents to an exchange of other securities for those deposited by the bankers, without any new stipulation as to the period of redemption, and the bankers afterwards become bankrupt. *Held*, under these circumstances, that the time for replacing the Cuba bonds became indefinite, and that the bankers were not bound to replace them until requested to do so; and that, no request having been made by the customer before their bankruptcy, the customer had no right of proving for the amount of the bonds under the fiat, and that the 6 *Geo. 4. c. 16. s. 56*, as to the proof of contingent debts, did not apply.

A customer deposits a box containing various securities with his bankers for safe custody, and afterwards grants a loan of a portion of them to one of the partners in the

banking-house for his own private purposes, upon his depositing in the box certain railway shares, to secure the replacing of the securities thus lent to him. This partner afterwards, for his own purposes, and without the knowledge of the customer, subtracts the railway shares, and substitutes others of less value. *Held*, that as the proceeds of the railway shares were not applied to the use of the partnership, the banking firm were not answerable for this tortious act of their partner for his own benefit, and consequently that the customer had no right of proof against the joint estate for the amount of the difference between the value of the shares subtracted and those that were substituted.

Held, also, that the partners were not chargeable with any loss occasioned by their subtraction of the shares, on the ground of negligence; and that even if they were, it would be a claim for unliquidated damages, and therefore not provable against the joint estate. *Ex parte Eyre*, 3 M. D. & D. 12; 1 Phil. 227.

2. In assumpsit for money paid, defendant pleaded his bankruptcy and certificate; and that the money was paid for a debt of defendant, for which plaintiff was surety; that the debt was due, and plaintiff liable for it, before the bankruptcy; and that the money was paid without any request from defendant, except such as might legally arise from the premises; and that the surety had not, when he

became liable, notice of any act of bankruptcy.

Replication: that before the payment, defendant had obtained his certificate, and a final dividend had been made; and that there was not at any time any debt in respect of the payment of which plaintiff could have proved, or received a dividend. *Held*, on demurrer to the replication, that the plaintiff's claim was proveable, under stat. 6 Geo. 4. c. 16. s. 52, and that the action was therefore barred by sect. 121. *Jackson v. Magee*, 3 Ad. & Ell. N.S. 48.

3. The rule that a joint creditor cannot prove against one of his debtors, if another be solvent, is not confined to cases of partnership, but applies to co-contractors generally. *Ex parte Field*, 3 M. D. & D. 195.

4. A proof will not be ordered to be expunged merely because the instrument on which the proof was made required a stamp. *Ex parte Byrom*, 3 M. D. & D. 53.

5. A judgment creditor, who, having taken the body of a bankrupt in execution before the bankruptcy, keeps him in prison till he is discharged by his certificate, cannot prove under the bankruptcy.

Whether a final judgment by default, not obtained by collusion but adversely, which could not have been disputed, if the debtor remained solvent, may be impeached under his bankruptcy, on a proof being tendered upon it, *quære*.

But if the judgment were obtained

under such circumstances as would have been a ground for the interference of a Court of Equity to restrain execution, those circumstances are a sufficient objection to the proof, although the debtor may have omitted to make a legal defence which he had to the action, and although (under such circumstances as those of the present case) nearly twenty years have elapsed since the judgment was obtained. *Ex parte Mudie*, 3 M. D. & D. 66.

6. Where a bankrupt, after the commission of an act of bankruptcy, of which his bankers had notice—though not the act of bankruptcy on which the fiat issued—drew upon them various cheques in favour of several of his creditors, which cheques were duly paid by the bankers; it was held that the bankers could not prove the amount of these payments under the fiat. Where bankers, with the knowledge of an act of bankruptcy committed by their customer, took a guarantee from a surety on his behalf, to secure to a given amount all sums then or thereafter to become due from the customer, but the surety had no notice of the act of bankruptcy, and afterwards paid to the bankers the full sum for which he was guarantee, without specifying to which portion of the bankers' debt the payment was to be applied: *Held*, that such payment was to go in reduction of that portion of the bankers' debt which was proveable under the fiat, and not of that which was not prove-

able. *Ex parte Sharp*, 3 M. D. & D. 490.

See BOND—CONTINGENT DEBT—FUTURE DEBT—GUARANTEE—MORTGAGE, 12—PARTNER—PETITIONING CREDITOR, 1—SURETY—TRUSTEE, 2, 3, 4.

PROOF, EXPUNGING.

See STAMP, 1, 3.

PROTECTED TRANSACTIONS.

A., a trader, on the 2d of October, gave *B.*, one of his creditors, an order for money drawn by a board of guardians of the poor on their treasurer, payable to *A.*, but not to bearer or order. On the 4th of October *A.* committed an act of bankruptcy, of which *B.* had notice on the 5th. On the 9th, the treasurer of the union paid *B.* the amount of the order. A fiat of bankruptcy issued against *A.* on the 22d of November. *Held*, that *A.*'s assignees could not recover the amount of the order in an action for money had and received by *B.*, as this was a "transaction protected by the stat. 2 & 3 Vict. c. 29. s. 1," and that the "transaction" was, so far as the bankrupt was concerned, complete on the 2d of October.

To determine whether a fraudulent preference has been given by a bankrupt to one of his creditors by a payment, it will be for the jury to say whether the payment was voluntary, and without any pressure by the creditor, and was made when the debtor knew that he must be a bankrupt, and in contemplation of bankruptcy.

In order to constitute "pressure," it is not necessary that legal proceedings should have been resorted to, for if the pressure was such that it overweighed the bankrupt's own inclination, and induced him to pay against his will, that would be sufficient pressure within the meaning of the bankrupt laws.

From a person being in embarrassed circumstances, it does not necessarily follow that he contemplates bankruptcy, as he may hope that his affairs may rally and come round. *Green v. Bradfield*, 1 Car. & Kir. 449.

See EXECUTION, 1, 6, 14—PROOF, 6—
REPUTED OWNERSHIP.

PROTECTION FROM ARREST.

1. A defendant being in execution at the suit of plaintiff, plaintiff obtained a vesting Order from the Insolvent Debtors' Court, under stat. 1 & 2 Vict. c. 110. ss. 36, 37. Defendant did not petition that Court for discharge, but afterwards petitioned the Court of Bankruptcy, and obtained a final order of protection under stat. 5 & 6 Vict. c. 116. s. 4. *Held*, that he was not entitled to be discharged from execution, the provisions of stat. 5 & 6 Vict. c. 116, in this respect not applying to the case of a party in custody at the time of his petitioning. *Culpeper v. Joy*, 4 Ad. & Ell. N. S. 172; 3 Gale & Dav. 619.

2. The bankrupt's privilege from arrest extends to a committal under

the act for the Relief of Insolvent Debtors, for nonpayment of a balance due from the bankrupt, as assignee under that act. *Ex parte Bury*, 3 M. D. & D. 309.

3. An interim order by a Commissioner of bankrupt for the protection of an insolvent (under 5 & 6 Vict. c. 116. s. 1), if in the form prescribed in the rules promulgated by the Judges and Commissioners of the Court of Bankruptcy (under sect. 13), is sufficient, and need not show on the face of it the jurisdiction of the Commissioner to make such Order.

A defendant having been arrested after such an interim order had been in fact made (but before notice to the sheriff or the plaintiff), this Court ordered his discharge, although the jurisdiction of the Commissioner did not appear either by the Order itself or the affidavits upon which the application to this Court was made; but they refused to give costs against the sheriff or against the plaintiff. *Marsh v. Woolley*, 5 M. & G. 675; 6 Scott, N. R. 555; 3 Dowl. N. S. 84.

RECEIVER.

The conditional order heretofore issued in the first instance on application for a receiver, under 5 & 6 Will. 4. c. 55, did not give the judgment creditor priority over the assignees of the debtor committing an act of bankruptcy intermediately between the times of obtaining the conditional and the absolute order, nor had the subsequent orders relation back to the

conditional order. *Semble*, the order confirming the Master's report was the order contemplated by the act. *Burt v. Bernard*, 2 Conn. & Law. 271.

REGISTRAR.

See Costs, 9.

RELATION.

A contract under seal by a trader to execute certain works for the defendant contained a stipulation that if the contractor should become bankrupt or insolvent, or should from any other cause (not arising from the act of the defendant) be prevented from, or delayed in, proceeding with the works, it should be lawful for defendant to give a notice to the contractor requiring him to proceed regularly with them; and in case the contractor should, for seven days after the notice, make default in proceeding, it should be lawful for defendant to employ others to complete the work at the contractor's expense; and that all advances made by defendant on account before such default should be taken as full payment for all the work done by the contractor, and that all the balance due to him, and all tools and materials then delivered for, and being upon, the works should, upon such default, become the absolute property of defendant; and that all materials brought and left on the works by the contractor, to be permanently used on or about the same, should, from the time of being so

brought and left, be considered as the property of defendant, and should not be removed without his consent. The contractor having made default in proceeding with the works, defendant, on 11th April, duly served him with notice to proceed. On 17th April the contractor committed an act of bankruptcy.

Held, that the defendant could not, on 19th April, take possession of the tools and materials left by the bankrupt upon the work at the time of the bankruptcy; because the title of the assignees was complete by relation on the 17th. *Rouch v. Great Western Railway Company*, 1 Ad. & Ell. N. S. 51.

REPUTED OWNERSHIP.

1. An hotel keeper dies intestate, leaving four children, upon which one of her daughters takes possession of the stock and effects, and continues the business for a short time, when she admits one of her brothers into partnership, and the two carry on the business together in their own names for nearly two years, paying some of the intestate's debts as well as her funeral expenses. The daughter then retires, and assigns her share in the business to her brother, who carries it on in his own name for six months longer, when a joint fiat issues against the two. After their bankruptcy, one of the other children takes out administration to the intestate, and claims the property from the assignees. *Held*,

that this could not be considered trust property, but passed to the assignees under the clause of reputed ownership. *Ex parte Thomas*, 3 M. D. & D. 40.

2. A father by deed assigns to his son, in consideration of natural love and affection, certain pictures and effects, upon trust to permit the father to have the present use and enjoyment of them during his life, and subject thereto to the proper use and benefit of the son. Formal possession is delivered to the son upon the execution of the deed, by the delivery of one picture in the name of the whole; but the father remains in possession till his bankruptcy. *Held*, that the assignees were entitled to the goods. *Ex parte Castle*, 3 M. D. & D. 117.

3. The bankrupts, being mortgagees of various policies of life assurance, of which the respective insurance offices had notice, deposit them with their bankers to secure the repayment of advances; but the bankers give no notice of such deposit to the different offices. *Held*, that the policies must be considered as in the order and disposition of the bankrupts, within the 72d section of the Bankrupt Act, and that the same principle applied to one of the policies which was effected with a mutual assurance company. *Ex parte Arkwright*, 3 M. D. & D. 129.

4. A legatee, to whom an annuity is bequeathed for her life, grants an annuity for her life to *A.*, to be is-

suing out of the bequeathed annuity, and afterwards grants another annuity for her life to *B.*, to be also issuing out of the bequeathed annuity, which is insufficient to answer both the granted annuities. By a compromise of a suit respecting the priority of the charges, it is agreed that *B.*'s annuity shall have precedence, and that the residue of the bequeathed annuity shall be paid to *A.* *A.* then assigns his interest to a purchaser, describing it as the residue of the bequeathed annuity, after payment of *B.*'s annuity, and becomes bankrupt. *Held*, that the assignment was merely equitable, and required, to complete it, notice to be given to the trustees of the will.

But, it appearing that *A.* was the solicitor of the purchaser, and was trusted by her to do all that was proper for perfecting the purchase and assignment, and that he had not informed her that he was himself the vendor, *held*, that although the proper notice of the assignment was not given, the annuity was not in the order and disposition of the bankrupt with the consent of the true owner. *Ex parte Smyth*, 3 M. D. & D. 687.

5. Goods suffered by the true owner to remain in the possession of a trader till after a secret act of bankruptcy, but taken possession of before the fiat, do not, since 2 & 3 Vict. c. 29, pass to the assignees. *Pariente v. Pennell*, 2 Moo. & Rob. 517.

6. Where a mill and the machinery

therein had been mortgaged, and the mortgagor continued in possession until the time of bankruptcy: *Held*, that the machinery was not in the order and disposition of the bankrupt within the meaning of the bankrupt acts. *Fletcher v. Manning*, 1 Car. & Kir. 350.

See ACT OF BANKRUPTCY, 1—BILL OF EXCHANGE, 3—EXECUTION, 9—LIEN, 4—MORTGAGE, 11—POLICY OF ASSURANCE.

REVIVOR.

See COSTS, 6.

REVIVAL OF DEBT.

See CERTIFICATE, 5.

SALE.

Form of Order, upon the petition of an assignee, who had in the name of an agent bid at a sale for a portion of the bankrupt's property, and then prayed to have the sale completed, or the property resold. *Ex parte Gore*, 3 M. D. & D. 77.

See ASSIGNEES, 4—COSTS, 8.

SALVAGE.

See SHIP.

SAVINGS' BANK.

1. 'The treasurer of a savings' bank, on his appointment, enters into the usual bond for performance of his duties, but does not receive any money, the deposits being paid by the managers directly to a banking firm, of which the treasurer is a partner, to the credit of the trustees of

the savings' bank, who are allowed interest upon it. But he nevertheless signs the return (required by the act) to the commissioners for the reduction of the national debt, and thereby acknowledges the amount of the balance standing to the credit of the trustees to be monies in his hands as treasurer. The firm become bankrupt. *Held*, that the balance was in the hands of the treasurer as treasurer at his bankruptcy, and might be recovered in full by the savings' bank. *Ex parte Riddell*, 3 M. D. & D. 80.

2. The 3 & 4 Will. 4. c. 14. s. 8, providing, that if any person thereafter to be appointed to an office in a savings' bank, and having money in his hands belonging to the bank, shall become bankrupt, the bank shall be paid in full, applies only to savings' banks which have conformed to 9 Geo. 4. c. 92.

What is a sufficient compliance with 9 Geo. 4. c. 92. s. 6, providing that no savings' bank shall have the benefit of the act, unless its rules provide that no person, being treasurer, trustee, or manager of such institution, or having any control in the management thereof shall derive any benefit from the deposits in the bank, except as in the act mentioned.

The certificate of the barrister appointed under the provisions of 9 Geo. 4. c. 92, that the rules of a savings' bank are in conformity with the act, is not conclusive. *Ex parte Haynes*, 3 M. D. & D. 663.

SCIRE FACIAS.

See COSTS, 6.

SEPARATE DEBT.

See PARTNER.

SEPARATE USE.

See HUSBAND AND WIFE.

SERVICE OF PETITION.

See PETITION—TRUST, 6—ADVERTISEMENT, 3.

SET-OFF.

1. *A.* borrows money of *B. & Co.*, country bankers, on his promissory note, which they deposit indorsed, along with other bills and notes, with *W. & Co.*, their London agents, to secure the payment of advances. *B. & Co.* become bankrupt, when *A.* held notes issued by their bank more than sufficient to discharge the amount of his promissory note; and *W. & Co.* also held bills and notes of *B. & Co.* to a greater amount than the balance due to them from *B. & Co.* *W. & Co.* compel *A.* to pay to them the amount of his promissory note, and refuse to allow him to set off the notes he held of *B. & Co.*; and *A.*, not knowing that *W. & Co.* held sufficient securities to discharge the balance due to them from *B. & Co.*, proved under the fiat for the amount of the notes held by *B. & Co.* The assignees of *B. & Co.* then pay *W. & Co.* the amount of the balance due to them, after receiving credit for the sum paid by *A.* in discharge of his

promissory note, and take out of *W. & Co.*'s hands all the remaining securities: *Held*, that, as *A.* would have had a right of set-off against the bankrupts, if they had continued in possession of his promissory note, he was not to be deprived of this right by his ignorance of the state of the account between *W. & Co.* and the bankrupts, and that the assignees were therefore bound, on the withdrawal of his proof, to repay him the amount of his promissory note. *Ex parte Staddon*, 3 M. D. & D. 256.

2. The defendants being indebted for money advanced to them on their banking account by their bankers, who subsequently became bankrupt, received from their customers, on the day on which the bank stopped payment, and the day following, but without notice of an act of bankruptcy, and before any docket had been struck, certain *5l.* notes of the bank, payable to bearer on demand, in part payment of antecedent debts, on the condition that they were to debit themselves with so much only as they should receive from the assignees for such notes. They also received, during the same period, other *5l.* notes of the bank, for which they were to pay so much only as they should receive from the assignees for such notes. An action having been brought by assignees of the bankrupts against the defendants for money lent by the bankrupts before their bankruptcy, *Held*, that the defendants had a beneficial interest

in the first mentioned class of notes, and were therefore entitled to set them off; but that they were not entitled to set off the last mentioned class, as they held them merely as trustees for others. *Forster v. Wilson*, 12 M. & W. 191.

See HUSBAND AND WIFE, 1.

SETTLEMENT.

See HUSBAND AND WIFE.

(*Voluntary.*)

See VOLUNTARY DEED.

SHERIFF.

See ANNULLING, 5—EXECUTION, 9,
14—PLEADING, 3.

SHIP.

Assignees of a bankrupt ship-owner have a *persona standi* to appear for the benefit of the general estate, and contest the appropriation of the proceeds against the assignees of the freight, seeking to make the ship alone liable in the first instance.

Parties taking an assignment of a ship or freight as security for a debt, take such security liable to subsequently accruing liens, viz. bottomry bonds, salvage, wages, &c.

Claim of a bondholder for the payment of his bond directed to be satisfied out of the proceeds of the ship and the freight *pro rata*.

Same principle applied to claims under a judgment of the Court for pilotage, towage, and mariners' wages. *The Dowthorpe*, 2 Robinson's Adm. Rep. 73.

SHORT BILLS.

A bill of exchange remitted by a customer to his bankers, and not due, but remaining in specie at the time of their bankruptcy, continues the property of the customer; and the same is the law as to a bank post bill, which the customer sends to the bankers, with a letter desiring them to place it to his credit, and to send him a receipt. *Ex parte Atkins*, 3 M. D. & D. 103.

SOLICITOR.

Solicitor to the fiat receiving the proceeds of a sale of goods belonging to the bankrupt, which the solicitor freed from an execution by giving his own personal security to the sheriff by way of indemnity, has no lien on those proceeds by way of counter indemnity to himself, even though the proceeding should have taken place with the consent of the assignee. *Ex parte White*, 3 M. D. & D. 7.

See COMMISSION—CONTEMPT.

SPECIAL CASE.

1. A special case must set forth the conclusion of fact drawn by the Court below from the evidence and not the evidence itself. *Ex parte White*, 3 M. D. & D. 7.

2. An appeal from the refusal of a motion by the Court of Review should be by way of special case, and not by way of motion before the Lord Chancellor. *Ex parte Carothers*, 3 M. D. & D. 269.

STAMP.

1. A proof will not be ordered to be expunged merely because the instrument on which the proof was made required a stamp. *Ex parte Byrom*, 3 M. D. & D. 53.

2. Assignees of a bankrupt sold his houses by auction for the benefit of the creditors, and the purchaser signed a contract, by which, after reciting the purchase and payment of a deposit, he engaged to complete such purchase on the terms of the conditions of sale, which both parties agreed by the contract to fulfil.

Held, that the contract was an instrument exempted from stamp duty by stat. 6 Geo. 4. c. 16. s. 98. *Flather v. Stubbs*, 2 Ad. & Ell. N. S. 614.

3. On a petition to expunge a proof on a negotiable instrument, *held*, that the respondent was not bound to have the instrument in Court unless the petitioners gave him notice to produce it, and that in its absence the Court could not attend to a suggestion that it was not stamped. *Ex parte Christie*, 3 M. D. & D. 736.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

SUITS.

See BANKRUPTCY.

SURETY.

Merchants procure accommodation from bankers on entering into a covenant with sureties to pay the

floating balance due from them from time to time up to a certain limited amount, subject to a proviso that in the event of the merchants' bankruptcy, and in the event of the amount due exceeding at that time the limit, any dividends received under the bankruptcy should be applied exclusively in payment of the excess, without the sureties being entitled to any part of the dividends until the whole of such excess was paid. Some of the sureties take from one of the principal debtors a counter-security and indemnity in respect of their liability under the covenant, but without the bankers having notice of the transaction. The merchants become bankrupt, being indebted to the merchants beyond the limit fixed by the deed, and the bankers receive dividends on the whole debt, and recover the amount secured by the deed from the sureties, two of whom are reimbursed by means of their counter-security out of the separate estate of one of the bankrupts. *Held*, that the bankers were entitled to retain the whole amount so received by them. *Ex parte Hope*, 3 M. D. & D. 720.

And see PROOF, 2.

TRADING.

A lessee of an iron mine purchases large quantities of pig iron, which he manufactures into cast-iron implements for the purpose of working it, and the surplus of the cast-iron which he did not use he sold to

persons in the neighbourhood. *Quære*, whether this was not a trading within the bankrupt law. At any rate, the point was so doubtful, that the Court declined to annul the fiat on the petition of the bankrupt, but would only give him leave to try the question in an action at law. *Ex parte Salkeld*, 3 M. D. & D. 125.

TROVER.

See PLEADING—EXECUTION, 14.

TRUST.

1. An hotel-keeper dies intestate, leaving four children, upon which one of her daughters takes possession of the stock and effects, and continues the business for a short time, when she admits one of her brothers into partnership, and the two carry on the business together in their own names for nearly two years, paying some of the intestate's debts as well as her funeral expenses. The daughter then retires, and assigns her share in the business to her brother, who carries it on in his own name for six months longer, when a joint fiat issues against the two. After their bankruptcy, one of the other children takes out administration to the intestate, and claims the property from the assignees. *Held*, that this could not be considered trust property, but passed to the assignees under the clause of reputed ownership. *Ex parte Thomas*, 3 M. D. & D. 40.

2. By a marriage settlement a sum of money was to be received by the

trustees, and invested in government or real securities, and the interest was to be paid to the wife for life for her separate use, with remainder to the children. One of the trustees receives the money, and advances it to a partnership of merchants, without taking any security. He receives the interest from the partnership, and pays it over to the wife regularly up to the time of his death; afterwards the partnership pays the interest to the wife directly and without the intervention of the surviving trustee. In the partnership books the accounts relating to the whole transaction are entered as between the wife and the partnership only. Upon the partnership becoming bankrupt, *held*, that the partners constituted themselves directly, and not merely constructively, trustees, and that the proof on behalf of the trust estate might be made either against the joint estate or the separate estates. *Quære*, whether there would have been a right of proof against the separate estates, if the firm had been constructive trustees only; or whether the term "constructive trust" is sufficiently definite to admit of any general rule being laid down upon the point. *Ex parte Woodin*, 3 M. D. & D. 399.

3. A trustee under a will permits the trust fund, as the monies are from time to time realized, to be paid into the hands of certain bankers, who have knowledge of the trusts. One of the partners, without the as-

sent of the trustee, deals with a portion of the fund by investing it on mortgage. *Held*, that the bankers were not jointly and separately liable in the character of trustees, but that they only incurred a liability as between banker and customer; and that, on the bankruptcy of the bankers, the trustee could only prove against their joint estate for such balance as was in their hands at the time of their bankruptcy.

Seemle, that the sum laid out on mortgage must be considered as in their hands at the time of the bankruptcy, although the mortgage itself might enure for the benefit of the *cestui que trust*. *Ex parte Burton*, 3 M. D. & D. 364.

4. Infant *cestuis que trustent* are entitled to a sum of stock standing in the names of trustees, subject to a life interest in their mother, and to a power of appointment, which has not yet been exercised. The trustees are charged with having sold out the stock, and advanced the proceeds to the father of the *cestuis que trustent*; and, in a Chancery suit, instituted by the infants, the trustees are ordered to pay into Court the amount which by their answer they admit they received upon such sale. They do not comply with the Order, but become insolvent, and one becomes bankrupt. *Held*, that the *cestuis que trustent* were not entitled to an Order to prove against the estate of the latter, either for the value of the original sum of stock, or the sum ordered to

be paid into Court, but only to an Order to go in and make such proof as they could establish, the dividends on the proof being payable into Court. *Ex parte Coles*, 3 M. D. & D. 327.

5. A bankrupt's reversionary interest under the trusts of a will ordered to be sold and the proceeds applied in making good monies come to his hands as trustee under the same trusts and misapplied.

The residence of a party, interested in trust funds out of the jurisdiction, does not authorize the Court to appoint new trustees without notice being given to such party.

A testator bequeathed his residuary estate to two trustees, whom he appointed executors; one of them renounced; and after the death of the other, the trust funds came into the possession of the latter's legal personal representative, who became bankrupt. The *cestuis que trustent* presented a petition for the appointment of a new trustee. On its appearing that the original testator had been dead for twenty years, and that the interest of the trust fund had ever since been applied according to the trusts, and on the petitioners' deposing that to the best of their belief all the original testator's debts, &c. had been paid: *Held*, that a new trustee might be appointed without its appearing that any personal representative of the original testator was before the Court. *Ex parte Hardman*, 3 M. D. & D. 559.

6. Where a fund, arising from dividends upon a proof, has been transferred to the separate account of a marriage settlement, a petition, by parties claiming under the settlement, for payment of the fund out of Court, need not be served upon the assignees. If, under a power to appoint new trustees, which is in the ordinary form, and is silent as to any increase in the number of trustees, four trustees be appointed in the room of three, (the original number), the appointment is bad, and the fund will not be paid over to the persons so appointed. *Ex parte Davis*, 3 M. D. & D. 304.

See LIEN, 7.

VENDOR AND PURCHASER.

See ASSIGNEES, 7—*MORTGAGE*, 10.

VENUE.

1. Where a fiat has been opened, and the bankrupt's examination has commenced, it is a sufficient answer to a petition to change the venue of the fiat, that the petitioners do not make out a grave case of benefit to the estate, combined with the absence of injustice to the bankrupt. *Ex parte Mitchell*, 3 M. D. & D. 397.

2. The venue of a fiat will not be changed, because the existing means of communication between the place of trading and the District Court to which it belongs are not so convenient as those between the place of trading and another District Court. *Re Oram*, 3 M. D. & D. 330.

VIVA VOCE.

1. The evidence at the hearing of a petition may be partly by affidavit and partly *viva voce*. Leave given to the respondents to examine their own witnesses *viva voce*, when affidavits had been filed in support of the petition. *Ex parte Fell*, 3 M. D. & D. 472.

2. Where, upon an application on the part of the respondents (the assignees) for an examination of witnesses *viva voce*, the petitioners objected that there was a preliminary question, which might render the matter of fact in dispute immaterial; *Held*, under all the circumstances of the case, that the respondents ought to be at liberty to examine their own witnesses *viva voce*, undertaking to abide personally and otherwise by the Order of the Court as to costs; the petitioners being at liberty to produce evidence, either by affidavit or *viva voce*. *Ex parte Melville*, 3 M. D. & D. 474.

VOLUNTARY DEED.

A person gave a bond for 5000*l.* to his sister, but failing to pay the interest due on that bond, gave her another bond to secure the arrears of interest. He afterwards deposited with his sister the title deeds of his real estates as a collateral security for the bond debts, and subsequently in contemplation of the marriage of the sister the two bonds were, with the consent and privity of the obligor, settled upon trusts for the bene-

fit of the intended husband and wife, no reference, however, being made in the settlement to the deposit of title deeds. The marriage took effect, and about four years after the obligor became bankrupt. *Held*, that assuming the consideration for the first bond to have been voluntary, yet there being no fraud suggested against any party, or insolvency proved against the obligor, the settlement was a valuable security : and that by virtue of the bonds, the instrument of deposit and the settlement, the trustee of the settlement was equitable mortgagee of the real estate for the monies due on the bonds. The circumstance that the Court of Bankruptcy has concurrent jurisdiction in the case, is not a necessary ground for refusing costs to a party seeking the assistance of a Court of Equity. *Meggison v. Foster*, 2 Y. & C. C. C. 336.

See ACT OF BANKRUPTCY, 1—REPUTED OWNERSHIP.

VOLUNTARY PAYMENT.

See FRAUD.

WARRANT.

1. Where a bankrupt, who had been examined in 1841 before the then Commissioners of Bankrupts acting under a country fiat, and committed by them for giving unsatisfactory answers, was, in November 1843, again brought up before a Commissioner appointed under the stat. 5 & 6 Vict. c. 122. s. 59, and

his answers to the questions then put to him were unsatisfactory to the Commissioner, who, however, then stated that he should not grant a fresh warrant of commitment, but on a subsequent day issued a warrant under which the bankrupt was detained in custody. *Held*, first, that the warrant so issued was valid ; secondly, that it was not necessary to set forth the questions and answers on the first examination in 1841 ; thirdly, that a single Commissioner has power to commit in such a case, under the 5 & 6 Vict. c. 122. ss. 46 and 52. *Ex parte Dauncey*, 12 M. & W. 271.

2. A bankrupt was committed by the Commissioners upon a warrant, the concluding words of which were, " which said several answers so given on the said several examinations as aforesaid of the said *W. D.*, and the schedule by him referred to and hereunto annexed as part of this our warrant, not being satisfactory to us the said Commissioners, these are therefore to require you, &c. to take him into custody and keep him," &c.

Upon an application to the Court of Queen's Bench that the prisoner might be brought up to be discharged for the insufficiency of the warrant, it appeared from the affidavit that several examinations of the prisoner had taken place, but the part of the warrant containing the question and answers was not brought before the Court by the affidavit, nor any part excepting the conclusion above set forth : *Held*,

that the part of the warrant before the Court was insufficient. *Ex parte Dauncey*, 3 G. & D. 640.

See COMMITMENT.

WARRANT OF ATTORNEY.

1. A warrant of attorney was given while the provision of 7 *Geo.* 4. c. 57. s. 33, (as continued by later acts), that such warrants or judgments on them should be void as against the assignees of an insolvent, unless filed within twenty-one days, or judgment entered up within the same time, was in force. Between the 16th August 1838, when the last of these acts, the 6 & 7 *Will.* 4. c. 44, expired, and the 1st October 1838, when the 1 & 2 *Vict.* c. 110. s. 60, came into effect, there was an interval during which no such provision was in force. *Held*, that notwithstanding this interval, a judgment on the warrant of attorney entered up since the 1 & 2 *Vict.* c. 110, was not valid as against assignees appointed under the act. *Collis v. Stone*, 3 G. & D. 625.

2. Where a defendant had given a warrant of attorney, upon which

judgment was signed and execution issued and levied, but the instrument was not duly filed in pursuance of the 3 *Geo.* 4. c. 39. s. 1, and the defendant afterwards became insolvent, and petitioned the Insolvent Court under the provisions of the 5 & 6 *Vict.* c. 116, under which petition assignees were appointed; the Court refused to set aside the judgment and execution upon the application of the assignees, holding that such instrument was not void as against them by reason of the non-filing thereof, as it did not fall within the provisions of the 3 *Geo.* 4. c. 39. s. 2, the 7 *Geo.* 4. c. 57. s. 33, nor the 1 & 2 *Vict.* c. 110. s. 60, and that the 5 & 6 *Vict.* c. 116. ss. 1 and 7, contained no words extending the provisions of those enactments to such an instrument. *Lawrence v. Lawrence*, 3 Dowl. N.S. 219.

See BILL OF EXCHANGE, 3—EXECUTION, 1, 4, 7.

WIFE.

See HUSBAND AND WIFE.

APPENDIX.

5 & 6 VICT. c. 122.

An Act for the Amendment of the Law of Bankruptcy.
[12th August, 1842.]

WHEREAS it is expedient to amend the law of bankruptcy :
and whereas by an act passed in the reign of his late majesty,
intituled "An Act to establish a Court in Bankruptcy," va- 1 & 2 Will. 4,
rious alterations were made in the administration of the law c. 56.
of bankruptcy, which have by experience been found bene-
ficial, and it is advisable to extend the provisions and regu-
lations contained in the said act : Be it therefore enacted by
the Queen's most excellent Majesty, by and with the advice
and consent of the lords spiritual and temporal, and com-
mons, in this present parliament assembled, and by the au-
thority of the same, That the provisions of this act, unless
where otherwise herein specially provided, shall commence
and take effect from and after the eleventh day of November
next.

Commencement
of this act.

2. And be it enacted, That all laws, statutes, and usages
shall be and the same are hereby repealed, in so far as they
may be inconsistent or at variance with the provisions of this
act ; provided always, that the same shall continue in force
in all other respects whatsoever.

Laws at vari-
ance with this
act repealed.

3. And be it enacted, That in every case of a petition for
the issue of a fiat in bankruptcy, it shall be lawful for the
Lord Chancellor to dispense, if he shall think fit, with the
bond now required to be given to him by the petitioning
creditor, conditioned for proving his debt, and for proving the
party to have committed an act of bankruptcy at the time of
issuing such fiat, and for proceeding upon such fiat ; and in
such case it shall be lawful to issue the fiat, without any such
bond having been given.

Petitioning cre-
ditor's bond may
be dispensed
with.

Fiat in bankruptcy to be transmitted direct to the court authorized to act in the prosecution thereof, and forthwith opened, unless postponed by the court.

In case fiat is not opened by petitioning creditor in the time allowed.

No fiat to be issued to petitioning creditor.

Person against whom a fiat in bankruptcy has issued, on proof of probable cause for believing that he is about to quit England, or to remove or conceal his goods, with intent to defraud creditors, may be arrested.

Any person so arrested may apply for his discharge forthwith.

4. And be it enacted, That every fiat in bankruptcy granted after the commencement of this act shall, after the granting of such fiat, be forthwith issued and transmitted by the Lord Chancellor's secretary of bankrupts, in such manner, and at such cost, as the Lord Chancellor by any general or other order shall direct, to the court to which such fiat shall be directed under and by virtue of the powers of any act now in force or of this act, and shall be forthwith opened, unless such court shall in its discretion think fit to postpone the opening of such fiat: Provided always, that if such fiat shall not be opened by the petitioning creditor within three days after it shall have been so transmitted, or within such extended time as shall be allowed by the said court, such court is hereby authorized to open such fiat, at any time within fourteen days then next following, upon the application of any other creditor to the amount required by this act to constitute a petitioning creditor, and to adjudicate thereon, upon the proof of the debt of such creditor, and of the other requisites to support such fiat: Provided always, that no such fiat shall be issued to the petitioning creditor, or his attorney or agent.

5. And be it enacted, That whenever any fiat in bankruptcy shall have issued against any person, and it shall be proved to the satisfaction of the court authorized to act in the prosecution of such fiat, that there is probable cause for believing that such person is about to quit England, or to remove or conceal any of his goods or chattels, with intent to defraud his creditors, unless he be forthwith apprehended, it shall be lawful for such court to issue a warrant, directed to any person or persons such court shall think fit, whereby such person or persons shall have authority to arrest the person named in such fiat by his body, and also to seize his books, papers, monies, securities for monies, goods, and chattels, wheresoever he or they may be found, and him and them safely keep until the expiration of the time allowed for opening such fiat, or until such person shall be adjudged bankrupt under such fiat, and be thereon dealt with under such fiat, according to the laws relating to bankrupts.

6. Provided always, and be it enacted, That it shall be lawful for any person arrested upon any such warrant, or for any person whose books, papers, monies, securities for monies, goods; or chattels have been seized under any such

warrant, to apply at any time after such arrest or seizure to such court for an order or rule on the petitioning creditor named in such fiat to show cause why the person arrested should not be discharged out of custody, or why his books, papers, monies, securities for monies, goods, and chattels should not be delivered up to him; and that it shall be lawful for such court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party; provided that any such order may be discharged or varied by the Court of Review, on application made thereto by either party dissatisfied with such order.

Court may discharge the person, or not.

Order of court may be appealed from.

7. And be it enacted, That no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issuing of any fiat in bankruptcy against him.

No person liable upon an act committed more than twelve months.

8. And be it enacted, That no fiat in bankruptcy shall be deemed invalid, by reason of any act of bankruptcy of the person against whom the adjudication of bankruptcy thereunder shall be made having been concerted or agreed upon between the bankrupt and any creditor or other person, save and except where any petition to supersede or annul a fiat for any such cause shall have been already presented, and shall be now pending.

Act of bankruptcy concerted between bankrupt and creditor, &c. not to invalidate fiat.

9. And be it enacted, That the amount of the debt or debts of any creditor or creditors petitioning for a fiat in bankruptcy shall hereafter be as follows; that is to say, the single debt of such creditor, or of two or more persons being partners, petitioning for the same, shall amount to 50*l.* or upwards, and the debt of two creditors so petitioning shall amount to 70*l.* or upwards, and the debt of three or more creditors so petitioning shall amount to 100*l.* or upwards; and that every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition or join in petitioning as aforesaid, whether he shall have had any security in writing for such sum or not.

Requisite amount of petitioning creditor's debt.

10. And be it enacted, That all livery stable keepers, coach proprietors, carriers, ship-owners, auctioneers, apothecaries, market-gardeners, cow-keepers, brick-makers, alum-makers, lime-burners, and millers shall be deemed traders, and subject and liable as traders to this and to the other statutes relating to bankrupts.

Persons specially named liable to become bankrupts.

Creditor of a trader making affidavit of his debt and of his having required payment, court may summon the trader.

11. And be it enacted, That if any creditor of any trader, within the meaning of this or any other statute relating to bankrupts now or hereafter to be in force, shall file an affidavit in the court authorized as hereinafter provided to act in the prosecution of fiats in bankruptcy in the district (to be described as hereinafter mentioned) in which such debtor shall reside, or in the court of bankruptcy if such debtor shall not reside in any such district, in the form specified in schedule hereunto annexed (A. No. 1), of the truth of his debt, and of the debtor, as he verily believes, being such trader as aforesaid, and of the delivery to such trader, personally, of an account in writing of the particulars of his demand, with a notice thereunder requiring immediate payment thereof, in the form specified in the said schedule (A. No. 2), it shall be lawful for the court in which such affidavit shall be filed, as the case may be, to issue a summons in writing, in the form specified in the said schedule (A. No. 3), calling upon such trader to appear before such court, and stating in such summons the purpose for which such trader is called upon by such summons to appear as hereinafter provided.

Manner of proceeding on summons of trader by a creditor.

12. And be it enacted, That, upon the appearance of any such trader so summoned as aforesaid, it shall be lawful for such court to require such trader to state whether or not he admits the demand of such creditor so sworn to as aforesaid, or any and what part thereof, and if such trader shall admit such demand or any part thereof to reduce such admission into writing, in the form specified in the schedule hereunto annexed (B. No. 1), and such admission so reduced into writing such trader is hereby required to sign, and the same is thereupon to be filed in such court; and it shall also be lawful for such court to allow such trader upon his said appearance to make a deposition upon oath, in writing under his hand, to be filed in such court, in the form specified in the said schedule (B. No. 2), that he verily believes he has a good defence to the said demand, or to some and what part thereof.

Trader not attending summons, or refusing to admit the demand and not making deposition of belief of a good defence thereto, and not

13. And be it enacted, That if any such trader so summoned as aforesaid shall not come before such court at the time appointed (having no lawful impediment made known to and proved to the satisfaction of the court at the said time, and allowed), or if any such trader, upon his appearance to such summons as aforesaid, or at any enlargement or ad-

jourment thereof (as the case may be), shall refuse to admit such demand, and shall not make a deposition, in the form hereinbefore mentioned, that he believes he has a good defence to such demand, then and in either of the said cases, if such trader shall not, within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for such demand to the satisfaction of such creditor, or enter into a bond, in such sum and with two sufficient sureties as such court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovering of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit.

paying or compounding within a certain time, or giving bond for payment, to be deemed an act of bankruptcy.

14. And be it enacted, That if any such trader so summoned as aforesaid upon his said appearance shall sign an admission of such demand in the form aforesaid, and shall not, within fourteen days next after the filing of such admission, pay, or tender and offer to pay, to such creditor the amount of such demand, or secure or compound for the same to the satisfaction of the creditor, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after the filing of such admission, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit.

Trader signing an admission of demand in form prescribed, and not paying, securing, or compounding within a certain time, an act of bankruptcy.

15. And be it enacted, That if any such trader, so summoned as aforesaid, shall upon his said appearance sign an admission for part only of such demand in the form aforesaid, and shall not make a deposition in the form hereinbefore required that he believes he has a good defence to the residue of such demand, then and in such case, if such trader, as to the sum so admitted, shall not, within fourteen days next after the filing of such admission, pay, or tender and offer to pay, to such creditor the sum so admitted, or secure or compound for the same to the satisfaction of the creditor, and as to the residue of such demand shall not, within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay,

Trader admitting part only of a demand, and not making deposition of a good defence to the residue, and not paying, securing, or compounding for sum admitted; and, as to residue, not paying or compounding or entering into bond to pay any sum recovered, with

costs; an act
of bankruptcy.

secure, or compound for the same to the satisfaction of such creditor, or enter into a bond, in such sum and with two sufficient sureties as such court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit.

What shall be
deemed a re-
fusal of admis-
sion of debt.

16. Provided always, and be it enacted, That if any such trader so summoned as aforesaid shall, upon his appearance before such court, refuse to sign the admission in that behalf required as aforesaid, whatever may be the nature of his statement, or whether he makes any statement or not, it shall be deemed, for the purposes of this act, that every such trader thereby refuses to admit such demand: Provided always, that it shall be lawful for such court, upon reasonable cause shown, to enlarge the time for calling upon such trader to state whether or not he admits such demand, or any part thereof, and for entering into such bond, or for either of such matters, for such time as such court shall think fit.

Court may en-
large the time
for admission
of demand.

Admission of
debt signed
elsewhere than
in court, if at-
tested by attor-
ney of trader,
may be filed,
and have the
same force as
an admission
signed by a
trader on his
appearance in
court under
the summons.

17. Provided always, and be it enacted, That an admission of any debt made after such summons as aforesaid, and signed by any such trader elsewhere than before such court, may be filed in such court, and shall be of the same force and effect to all intents and purposes as an admission signed by such trader so summoned as aforesaid on his appearance in such court, provided there be present some attorney of one of her Majesty's superior courts of law on behalf of such trader, expressly named by him and attending at his request, to inform him of the effect of such admission before the same is signed by such trader; and provided also, that such attorney do subscribe his name thereto as a witness to the due execution thereof, and in such attestation declare himself to be attorney for the said trader, and state therein that he subscribes as such attorney, and that such admission shall be made in the form of schedule (C.) hereunto annexed.

Trader sum-
moned on affi-
davit of debt
to have such

18. And be it enacted, That where any trader against whom an affidavit of debt is filed as aforesaid shall be summoned to appear before the court in which such affidavit

shall be filed, as the case may be, every such trader shall have such costs and charges as such court in its discretion shall think fit. costs as the court shall think fit.

19. And be it enacted, That in every action brought after the commencement of this act, wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the amount of the sum for which he shall have filed an affidavit of debt under the provisions of this act, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought, provided that it shall be made appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such court shall thereupon, by a rule or order of the same court, direct that such costs shall be allowed to the defendant; and the plaintiff shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed, the amount of the taxed costs of the defendant in such action; and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant to be taxed as aforesaid, that then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs so to be taxed as aforesaid, to take out execution for such costs in like manner as a defendant may now by law have execution for costs in other cases. Wherever a creditor (plaintiff) shall not recover the amount sworn to in his affidavit of debt filed against a trader, if such affidavit be made for such amount, without probable cause, the trader (defendant) shall be entitled to costs.

20. And be it enacted, That if any plaintiff shall recover judgment in any action personal for the recovery of any debt or money demand, in any of her Majesty's Courts of record, against any such trader, and shall be in a situation to sue out execution upon such judgment, and there be nothing due from such plaintiff by way of set-off against such judgment, and such trader shall not, within fourteen days after notice in writing personally served upon him requiring immediate payment of such judgment debt, pay, secure, or compound for the same to the satisfaction of such plaintiff, he shall be deemed to have committed an act of bankruptcy on the fif- Trader not paying, securing, or compounding for a judgment debt, upon which the plaintiff might sue out execution within fourteen days after notice requiring payment, an act of bankruptcy.

teenth day after service of such notice : Provided always, that if such execution shall in the meantime be suspended or restrained by any rule, order, or proceeding of any court of justice having jurisdiction in that behalf, no further proceeding shall be had on such notice, but that it shall be lawful nevertheless for such plaintiff, when he shall again be in a situation to sue out execution on such judgment, to proceed again by notice in manner before directed.

Trader disobeying order of any court of equity, or order in bankruptcy or lunacy, for payment of money, after service of order for payment on a peremptory day fixed, an act of bankruptcy.

21. And be it enacted, That if any decree or order shall be pronounced in any cause depending in any court of equity, or any order shall be made in any matter of bankruptcy or lunacy, against any such trader, ordering such trader to pay any sum of money, and such trader shall disobey such decree or order, the same having been duly served upon him, the person entitled to receive such sum under such decree or order, or interested in enforcing the payment thereof pursuant thereto, may apply to the court by which the same shall have been pronounced to fix a peremptory day for the payment of such money, which shall accordingly be fixed by an order for that purpose ; and if such trader, being personally served with such last-mentioned order fourteen days before the day therein appointed for payment of such money, shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy on the fifteenth day after the service of such order.

Trader filing a declaration of insolvency in the office of the secretary of bankrupts, an act of bankruptcy.

22. And be it enacted, That if any such trader shall file in the office of the Lord Chancellor's Secretary of Bankrupts a declaration in writing (in the form of schedule (D.) hereto annexed), signed by such trader, and attested by an attorney or solicitor, that he is unable to meet his engagements, every such trader shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such declaration ; and a copy of such declaration, purporting to be certified by the said secretary or his clerk as a true copy, shall be received as evidence of such declaration having been filed.

Person adjudged bankrupt to have notice thereof before adjudication advertised, and

23. And be it enacted, That before notice of any adjudication of bankruptcy under any fiat in bankruptcy issued after the commencement of this act shall be given in the London Gazette, and at or before the time of putting in ex-

execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person so adjudged bankrupt personally, or by leaving the same at the usual place of abode or place of business of such person, and that such person shall be allowed five days from the service of such duplicate to show cause to the court authorized to act in the prosecution of the fiat under which such adjudication shall have been made, against the validity of such adjudication; and that if such person shall within the time hereby allowed in that behalf show to the satisfaction of such court that the petitioning creditor's debt, trading, and act of bankruptcy upon which such adjudication shall have been grounded, or that any or either of such matters, are insufficient to support such adjudication, and upon such showing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last-mentioned matters as shall be requisite to support such adjudication in lieu of the petitioning creditor's debt, trading, and act of bankruptcy, or any or either of such matters which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of such court, such court shall thereupon cause a memorandum in writing to be filed with the proceedings under such fiat that such adjudication is annulled, and the same shall thereby be annulled accordingly; but if at the expiration of the said time no cause shall have been shown to the satisfaction of such court for the annulling of such adjudication, such court shall forthwith, after the expiration of such time, cause notice of such adjudication to be given in the London Gazette, and shall thereby appoint two public sittings of such court for the bankrupt to surrender and conform, the last of which sittings shall be on a day not less than thirty days and not exceeding sixty days from such advertisement, and shall be the day limited for such surrender: Provided always, that if such person so adjudged bankrupt shall, after such adjudication, and before the expiration of the time so allowed for showing cause as aforesaid, surrender to such fiat, and give his consent, testified in writing under his hand before such court, to such adjudication, and that the same may be advertised, such court, after such consent so given as aforesaid, shall forthwith cause notice of such adjudication to be advertised, and appoint the sittings for the bankrupt to surrender

to be allowed five days to show cause against adjudication; if petitioning creditor's debt, trading, or act of bankruptcy appear insufficient, adjudication to be annulled;

but if no cause shown for annulling adjudication, notice to be advertised, and sittings appointed for surrender.

With consent of bankrupt, adjudication may be advertised sooner.

Bankrupt to be
free from arrest.

and conform in manner aforesaid ; and such person so adjudged bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time by this act limited for such surrender, and such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed and confirmed, as such court shall from time to time, by endorsement upon the summons of such bankrupt, think fit to appoint, provided he was not in custody at the time of such surrender ; and if such bankrupt shall be arrested for debt or on an escape warrant in coming to surrender, or shall after his surrender be so arrested within the time aforesaid, he shall, on producing his summons signed as required by this act to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged ; and if any officer shall detain any such bankrupt after he shall have shown such summons to him, such officer shall forfeit to such bankrupt, for his own use, the sum of five pounds for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit ; and it shall be lawful for the court authorized to act in the prosecution of such fiat, at the time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, to adjourn such examination *sine die* ; and in such case he shall be free from arrest or imprisonment for such time not exceeding three months as such court shall from time to time by indorsement upon the summons of such bankrupt appoint, with like penalty upon any officer detaining such bankrupt after having been shown such summons.

Examination
may be ad-
journed.

If bankrupt
shall not pro-
ceed to dispute
the fiat, and
prosecute with
effect, the
Gazette to be
conclusive evi-
dence of the
bankruptcy as
against the
bankrupt, and
against persons
whom the bank-
rupt might have
sued had he not

24. And be it enacted, That if the bankrupt shall not (if he were within the united kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the London Gazette, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the Gazette containing such advertisement shall be conclusive

evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the Gazette to bear date; saving all rights which shall have accrued to any such person as aforesaid previous to the commencement of this act, and in respect of which any proceedings shall be pending at the time of the commencement of this act, which shall be adjudged and determined as if this act had not been passed.

25. And be it enacted, That in the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any fiat in bankruptcy already issued or hereafter to be issued, the deposition of any such deceased witness, purporting to be sealed with the seal of the Court of Bankruptcy, or a copy thereof purporting to be so sealed, shall in all cases be receivable in evidence of the matters therein respectively contained.

26. And be it enacted, That if the assignees commence any action or suit for any money due to the bankrupt's estate before the time allowed by this act for the bankrupt to dispute the fiat shall have elapsed, any defendant in any such action or suit shall be entitled, after notice given to the assignees, to pay the same or any part thereof into the court in which such action or suit is brought; and all proceedings with respect to the money so paid into court shall thereupon be stayed, until the time aforesaid shall have elapsed; and if within that time the bankrupt shall not have commenced such action, suit, or other proceeding as aforesaid, and prosecuted the same with due diligence, the money shall be paid out of court to the assignees, but otherwise shall abide the event of such action, suit, or other proceeding as aforesaid, and upon such event shall be paid out of court, either to the assignees, or the person adjudged bankrupt, as the court shall direct, and that after such payment so made into court it shall not be lawful for the person so adjudged bankrupt to proceed against the defendant for recovery of the same money.

27. And be it enacted, That it shall be lawful for the court authorized to act in the prosecution of any fiat in

been adjudged bankrupt, saving present rights for which any proceedings are pending.

Deposition of deceased witness of petitioning creditor's debt, trading, or act of bankruptcy, to be evidence of the matters therein contained.

Provision for debtor to the bankrupt's estate paying the debt into court, when sued by the assignees within the time for bankrupt to dispute.

Audits and dividends to be had and made

whenever the court think fit after the time appointed for the bankrupt's last examination.

bankruptcy, whenever such court shall think fit, at or after the sitting appointed for the last examination of the bankrupt named in such fiat, to audit the assignees' accounts, and to make a declaration of dividend under such fiat, subject nevertheless to such advertisement and such other provisions relating to such audits and dividends as are now required in respect of audits and dividends under bankrupts' estates, except such provisions as relate to the limitation of time in any manner respecting such audits and dividends, or the appointment thereof.

Court may order three months' wages or salary to clerks or servants.

28. And be it enacted, That when any bankrupt under a fiat issued after the commencement of this act shall have been indebted at the time of issuing the fiat against him to any servant or clerk of such bankrupt in respect of the wages or salary of such servant or clerk, it shall be lawful for the court authorized to act in the prosecution of such fiat, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding three months' wages or salary, and not exceeding thirty pounds, to be paid to such servant or clerk out of the estate of such bankrupt, and such servant or clerk shall be at liberty to prove under the fiat for any sum exceeding such last-mentioned amount.

Court may order wages not exceeding 40s. to labourer or workman.

29. And be it enacted, That when any bankrupt under a fiat issued after the commencement of this act shall have been indebted, at the time of issuing the fiat against him, to any labourer or workman of such bankrupt in respect of the wages or labour of such labourer or workman, it shall be lawful for the court authorized to act in the prosecution of such fiat, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding forty shillings, to be paid to such labourer or workman out of the estate of such bankrupt, and such labourer or workman shall be at liberty to prove under the fiat for any sum exceeding such last-mentioned amount.

Search warrants may be granted.

30. And be it enacted, That in all cases where it shall be made to appear to the satisfaction of the court authorized to act in the prosecution of any fiat in bankruptcy, that there is reason to suspect and believe that property of any bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such court is hereby directed and authorized to grant a search warrant to any person appointed by the court in which the adjudication against such bankrupt

shall have been made, and it shall be lawful for such person to execute such warrant according to the tenor thereof; and such person shall be entitled to the same protection as is allowed by law in execution of a search warrant for property reputed to be stolen or concealed.

31. And be it enacted, That if any person adjudged bankrupt after the commencement of this act shall at the time of his bankruptcy be a member of a firm, it shall be lawful for the court authorized to act in the prosecution of the fiat against such bankrupt to authorize the assignee, upon his application, to commence or prosecute any action at law or suit in equity in the name of such assignee and of the remaining partner, against any debtor of the partnership, and such judgment, decree, or order may be obtained therein as if such action or suit had been instituted with the consent of such partner, and if such partner shall execute any release of the debt or demand for which such action or suit is instituted such release shall be void; provided that every such partner shall have notice given him of such application, and be at liberty to show cause against it, and, if no benefit is claimed by him by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect of such action or suit, in such manner as such court upon his application shall direct; and that it shall be lawful for such court, upon the application of such partner, to direct that he may receive so much of the proceeds of such action or suit as such court shall direct.

In cases of a member of a firm being bankrupt, the court, upon application, may authorize actions or suits in name of the assignee of the bankrupt and the remaining partner.

Partner to have notice of such application, and may show cause against it.

Court may direct partner to have part of proceeds.

32. And be it enacted, That if any person adjudged bankrupt after the commencement of this act shall not, upon the day limited for the surrender of such bankrupt, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing to be left at the usual or last known place of abode or business of such person, or personal notice in case such person be then in prison, and notice given in the London Gazette of the issuing of the fiat, and of the sittings of the court authorized to act in the prosecution of the fiat against him, surrender himself to such court, and sign or subscribe such surrender, and submit to be examined before such court from time to time upon oath; or if any such bankrupt, upon such examination, shall not discover all his real and personal estate, and how, and to whom, upon what

Bankrupt not surrendering, and submitting to be examined;

or making discovery of his estate and effects;

or not delivering
up his estate,
books, &c. ;

or concealing,
&c. to the value
of 10*l.*, guilty
of felony, and
liable to trans-
portation or
imprisonment,
with or without
hard labour.

Court may
enlarge the time
for the bankrupt
surrendering
himself,

Bankrupt de-
stroying or
falsifying any of
his books, &c.,
or making false
entries, guilty
of a misde-
meanor, and
liable to im-
prisonment, with
or without hard
labour.

Bankrupt,
within three
months of his

consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto (except such part as shall have been really and *bond fide* before sold or disposed of in the way of his trade, or laid out in the ordinary expense of his family); or if any such bankrupt shall not upon such examination deliver up to the said court all such part of such estate, and all books, papers, and writings relating thereunto, as shall be in his possession, custody, or power (except the necessary wearing apparel of himself, his wife, and children); or if any such bankrupt shall remove, conceal, or embezzle any part of such estate to the value of ten pounds or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors; every such bankrupt shall be deemed guilty of felony, and be liable to be transported for life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge, or shall be liable to be imprisoned, with or without hard labour, in any common gaol, penitentiary house, or house of correction, for any term not exceeding seven years.

33. And be it enacted, That the court authorized to act in the prosecution of any fiat in bankruptcy shall have power, as often as such court shall think fit, from time to time, to enlarge the time for the bankrupt named in such fiat surrendering himself for such time as such court shall think fit, so as every such order be made six days at least before the day on which such bankrupt was to surrender himself.

34. And be it enacted, That if any bankrupt shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of this or any other statute relating to bankrupts, and after the commencement of this act, have destroyed, altered, mutilated, or falsified any of his books, papers, writings, or securities, or made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, every such bankrupt shall be deemed to be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned in any common gaol or house of correction for any term not exceeding three years, with or without hard labour.

35. And be it enacted, That if any bankrupt shall within three months next preceding his bankruptcy, and after the

commencement of this act, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, have obtained on credit from any other person any goods or chattels, with intent to defraud the owner thereof; or if any bankrupt shall within the time aforesaid, with such intent, have removed, concealed, or disposed of any goods or chattels so obtained, knowing them to have been so obtained; every such person so offending shall be deemed to be guilty of a misdemeanor, and being convicted thereof shall be liable to imprisonment for any term not exceeding two years, with or without hard labour.

bankruptcy, having obtained goods on credit under false pretence, or removing, concealing, &c. goods so obtained, guilty of a misdemeanor.

36. And be it enacted, That it shall be lawful for the court authorized to act in the prosecution of any fiat in bankruptcy issued after the commencement of this act, upon the request in writing of at least three creditors (not being partners) who shall have respectively proved debts to the amount of fifty pounds or upwards under such fiat, to direct the assignees of the bankrupt named in such fiat, if he shall be suspected of or charged with the commission of any of the offences specified in this act, to institute and carry on a prosecution of such bankrupt for such offence, and to order that the costs and expenses to be incurred in such prosecution shall be paid out of the estate and effects of the said bankrupt; and such assignees shall thereupon institute and carry on such prosecution; and in case the said assignees shall refuse or neglect to institute and carry on to conviction such prosecution, having no lawful or reasonable impediment made known to and allowed by the said court, the said court may order the same to be instituted and carried on either by the official assignee alone, or by the creditors making such request as aforesaid, as the said court may think fit.

Prosecution against bankrupt for any offence under this act may be ordered by the court acting in prosecution of the fiat.

37. And be it enacted, That every bankrupt, who shall have duly surrendered and in all things conformed himself to the laws in force at the time of issuing the fiat in bankruptcy against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the fiat, in case he shall obtain a certificate of such conformity so signed and allowed, and subject to such provisions as hereinafter mentioned; and no certificate of such conformity by any such bankrupt shall release or discharge such bankrupt from such debts, claims, or demands, unless such certificate shall be obtained, allowed, and con-

Bankrupt may be discharged by certificate of conformity in manner herein-after prescribed.

Discharge of bankrupt not to release or discharge a partner or person jointly bound.

firmed according to such provisions: provided always, that no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or was then jointly bound or had made any joint contract with such bankrupt; and provided also, that nothing herein contained shall affect the validity of any certificate allowed by the Lord Chancellor or Court of Review previous to the commencement of this act.

Bankrupt not entitled to certificate if he has lost by gaming 20*l.* in one day, or 200*l.* within twelve months, or 200*l.* by stock-jobbing.

38. Provided always, and be it enacted, That no bankrupt shall be entitled to the certificate under this act, and that any such certificate, if obtained, shall be void, if such bankrupt shall have lost by any sort of gaming or wagering in one day twenty pounds, or within one year next preceding his bankruptcy two hundred pounds, or if he shall within one year next preceding his bankruptcy have lost two hundred pounds by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract; or if such bankrupt shall, after an act of bankruptcy, or in contemplation of bankruptcy, or with intent to defeat the object of this or any other statute relating to bankrupts, have concealed, destroyed, altered, mutilated, or falsified, or caused to be concealed, destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or made, or been privy to the making any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, or shall have concealed any part of his property; or if any person having proved a false debt under the fiat, such bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his assignees, within one month after such knowledge.

or concealed or destroyed books, &c.

or made fraudulent entries;

or concealed any property, or permitted fictitious debts to be proved.

Mode of obtaining certificate of conformity.

39. And be it enacted, That it shall be lawful for the court authorized to act in the prosecution of any fiat in bankruptcy already issued, or hereafter to be issued, on the application of the bankrupt named in such fiat, to appoint a public sitting for the allowance of such certificate to the bankrupt named in such fiat (whereof and of the purport whereof twenty-one days notice shall be given in the London Gazette and to the solicitor of the assignees); and at such sitting any of the creditors of such bankrupt may be heard against the allowance of such certificate; but it shall not be requisite for such certificate to be signed by any of the creditors of such

bankrupt; and such court, having regard to the conformity of the bankrupt to the laws relating to bankrupts, and to the conduct of the bankrupt as a trader before as well as after his bankruptcy, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require: provided always, that no certificate shall be such discharge, unless such court shall, in writing under hand and seal, certify to the Court of Review that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery, and unless the bankrupt make oath in writing that such certificate was obtained fairly and without fraud, and unless the allowance of such certificate shall, after such oath, be confirmed by the Court of Review, against which confirmation any of the creditors of the bankrupt may be heard before such court.

Certificate not to be a discharge, unless the court certify a full conformity.

40. And be it enacted, That any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration, or with intent, to persuade such creditor to forbear opposing, or to consent to, the allowance or confirmation of such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence.

Contracts or securities to induce creditors to forbear opposition to be void.

41. And be it enacted, That if any creditor of a bankrupt shall obtain any sum of money, or any goods, chattels, or security for money, from any person, as an inducement for forbearing to oppose, or for consenting to the allowance or confirmation of, the certificate of such bankrupt, every such creditor so offending shall forfeit and lose for every such offence the treble value or amount of such money, goods, chattels, or security so obtained, (as the case may be), to be recovered as herein-after provided.

Penalty for obtaining money, goods, &c. as an inducement to forbear opposition, or consenting to allowance or confirmation of certificate.

42. And be it enacted, That any bankrupt who shall, after such certificate shall have been confirmed, be arrested, or have any action brought against him for any debt, claim, or demand proveable under the fiat against such bankrupt, shall

Bankrupt having obtained his certificate, free from arrest.

Certificate to be evidence of the bankruptcy and proceedings. Bankrupt in execution may be ordered to be discharged.

be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence ; and such bankrupt's certificate, and the confirmation thereof, shall be sufficient evidence of the trading, bankruptcy, fiat, and other proceedings precedent to the obtaining such certificate ; and if any such bankrupt shall be taken in execution or detained in prison for such debt, claim, or demand, where judgment has been obtained before the confirmation of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution to discharge such bankrupt, without exacting any fee, and such officer shall be hereby indemnified for so doing.

Bankrupt not liable upon any promise to pay debt discharged by certificate, unless such promise be in writing.

43. And be it enacted, That no bankrupt, after such certificate shall have been confirmed, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement made or to be made after the suing out of the fiat, unless such contract, promise, or agreement be made in writing signed by the bankrupt, or by some person thereto lawfully authorized in writing by such bankrupt.

Allowance to bankrupt.

44. And be it enacted, That every bankrupt who shall have obtained his certificate under any fiat issued after the commencement of this act, if the net produce of his estate in hand shall by any order of dividend (with or without prior dividend) pay the creditors who before, or at the time of making such order, have proved debts under the fiat ten shillings in the pound, shall be allowed and paid five pounds per centum out of such produce, provided such allowance shall not exceed four hundred pounds ; and every such bankrupt, if such produce shall (with or without prior dividend) pay such creditors twelve shillings and sixpence in the pound, shall be allowed and paid as aforesaid seven pounds ten shillings per centum, provided such allowance shall not exceed five hundred pounds ; and every such bankrupt, if such produce shall (with or without prior dividend) pay such creditors fifteen shillings in the pound or upwards, shall be allowed and paid as aforesaid ten pounds per centum, provided such allowance shall not exceed six hundred pounds ; and pro-

5 per cent., and not exceeding 400*l.*, as soon as 10*s.* paid in the pound ;

7½ per cent., and not exceeding 500*l.*, if 12*s.* 6*d.*;

10 per cent., and not exceeding 600*l.* if 15*s.*

vided always, that such allowance as aforesaid shall not be payable to any bankrupt until after the expiration of twelve months from the date of the fiat, and such allowance shall then be payable only in the event of the dividends paid to the creditors (who at any time before the expiration of such twelve months shall have proved debts under the fiat) being of the requisite amount in that behalf aforesaid; and if at the expiration of such time the dividends paid as aforesaid shall not amount to ten shillings in the pound, it shall be lawful for the court to allow such bankrupt so much as the assignees and court shall think fit, not exceeding three pounds per centum and three hundred pounds.

45. And be it enacted, That in all joint fiats under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate, and upon the separate estate of such partner, he shall be entitled to his allowance although his other partner may not be entitled to any allowance.

46. And whereas fiats in bankruptcy against traders residing within a limited distance from London are usually exclusively directed to the Court of Bankruptcy, and such distance may, in consequence of the increased facility of communication, be without inconvenience considerably extended; and it is expedient to make better provision for the prosecution of fiats in bankruptcy not directed to the Court of Bankruptcy; be it enacted, That every fiat in bankruptcy issued after the commencement of this act, not directed to the Court of Bankruptcy, shall be directed to such one of the courts authorized to act in the prosecution of fiats in bankruptcy in the country, as hereinafter provided, as the Lord Chancellor, or as the Master of the Rolls, one of the Vice Chancellors, or one of the Masters of the Court of Chancery acting under any appointment of the Lord Chancellor to be given for that purpose, by such fiat may think fit to nominate, to be prosecuted in such court, and that every such fiat shall be thereupon prosecuted in the court to which the same shall be so directed, and it shall be lawful for such court to proceed thereon in all respects as commissioners of bankrupt acting in the prosecution of a fiat in bankruptcy elsewhere than in the Court of Bankruptcy before the passing of this act, save and except as such proceeding may be altered by virtue of this act; and that in every bankruptcy prosecuted in any such

Allowance not payable till 12 months after date of fiat, and then only if requisite amount of dividends paid.

If at expiration of 12 months the dividends paid be under 10s. bankrupt may be allowed not exceeding 3 per cent., and 300*l*.

One partner may receive allowance, though others not entitled.

Fiats in bankruptcy, not directed to the Court of Bankruptcy, to be directed to some one of the courts authorized to act in the prosecution of fiats for the country, to be prosecuted in such court.

court every such court shall have all the power, jurisdiction, and authority, and be subject to the duty, by any act of parliament now in force vested in or imposed upon such commissioners, in all respects as if such court were commissioners of bankrupt returned and appointed under the said recited act, save and except as may be otherwise directed by this act.

Fiat in the country, and proceedings thereon to be transmitted to Court of Bankruptcy, to be there filed.

47. And be it enacted, That every fiat in bankruptcy prosecuted in the country, and the proceedings under such fiat, or any part of such proceedings, or copies or minutes of every such fiat and proceedings, or part thereof, at such time and in such manner and form as the Lord Chancellor shall direct, shall be transmitted by the court acting in the prosecution of such fiat to the Court of Bankruptcy in London, to be there filed and kept among the records of the said court.

Appointment of official assignees.

48. And be it enacted, That a number of persons, not exceeding thirty in the whole, being merchants, brokers, or accountants, or persons who are or have been engaged in trade in the united kingdom, shall be chosen by the Lord Chancellor to act as official assignees in all bankruptcies prosecuted in the country, one of which said official assignees shall in all cases be an assignee of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors, such official assignee to give such security, to be subject to such rules, to be selected for such estate, and to act in such manner, as the Lord Chancellor, or as the Court of Review or judge or any commissioners of the Court of Bankruptcy, if authorized so to do by any order of the Lord Chancellor, shall from time to time direct; and all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of all the estate and effects, real and personal, of every bankrupt, shall in every case be possessed and received by the official assignee alone, save where it shall be otherwise directed by the Lord Chancellor or by the court acting in the prosecution of the bankruptcy, if authorized so to do by any general or other order of the Lord Chancellor, and whether such official assignee be appointed under the provisions of the said recited act or of this act; and all stock in the public funds or of any public company, and all monies, exchequer bills, India bonds, or other public securities, and all bills, notes, and other negotiable instruments, shall be forthwith transferred, delivered, and paid by such official assignee into the Bank of England,

Their duty.

to the credit of the accountant in bankruptcy, to be subject to such order, rule, and regulation for the keeping of the account of the said monies and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as the Lord Chancellor, or as the Court of Review or judge or commissioner of the Court of Bankruptcy, if authorized so to do by any order of the Lord Chancellor, shall direct; and if any such assignee shall neglect to make such transfer, delivery, or payment, every such assignee shall be liable to be charged in the same manner as is provided in cases of neglect by assignees to invest money in the purchase of exchequer bills when directed so to do: Provided always, that, until assignees shall be chosen by the creditors of each bankrupt, such official assignee so to be appointed to act with the assignees to be chosen by the creditors shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estate and effects.

49. Provided always, and be it enacted, That nothing herein contained shall extend to authorize any such official assignee to interfere with the assignees chosen by the creditors in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estate or effects.

Proviso restricting the authority of official assignees.

50. And be it enacted, That it shall be lawful for the Lord Chancellor to remove any official assignee, whether appointed under the provisions of the said recited act or of this act, and from time to time, as any vacancy may occur in the said before-mentioned number of official assignees, to appoint some other such person as aforesaid to fill any vacancy so occurring; and in case of the death or removal of any such official assignee who shall have been appointed to act in any bankruptcy, it shall be lawful for the court authorized to act in the prosecution of such bankruptcy to appoint another official assignee of the number hereby prescribed to act (subject as aforesaid) in the same bankruptcy in the place of the assignee who shall have so become dead or been removed.

Lord Chancellor may remove official assignees, and may fill up vacancies in their number.

51. And be it enacted, That every official assignee of any bankrupt's estate appointed under the provisions of this act shall have all the same rights, powers, privileges, and exemptions as are possessed by official assignees appointed under the said recited act; and the enactments therein contained in

Official assignee invested with the same powers, &c. as official assignees under former act.

His remuneration.

that behalf, and, in relation to the evidence of the appointment of bankrupts' assignees, shall extend and be applied to official assignees to be appointed under this act, except as otherwise directed by this act; and that every official assignee, whether appointed under the provisions of the said recited or of this act, shall be entitled to be paid out of the bankrupt's estate, by way of remuneration for his services, such sum of money as to the court named in and acting under the fiat in prosecution against such bankrupt may seem just and reasonable, having regard to the amount of the bankrupt's property, and the nature of the duties to be performed by such official assignee, subject nevertheless to such general or special orders in relation thereto as may from time to time be made by the Lord Chancellor in that behalf.

Bankruptcies depending in the country to be removed into such of the courts authorized to act in the prosecution of fiats in bankruptcy, as the Lord Chancellor may think fit.

52. And be it enacted, That all power, jurisdiction, and authority of the commissioners named in any fiat of bankruptcy issued before the commencement of this act, to be prosecuted elsewhere than in the city of London, shall cease and determine; and that the Lord Chancellor shall have power from time to time, by any general or other order or orders under his hand, to transfer and remove into the Court of Bankruptcy, or such of the courts authorized to act in the prosecution of fiats in bankruptcy by virtue of this act, as he may deem fit, any such fiat, and that all further proceedings in every such fiat shall be thenceforth prosecuted and carried on in the court to which the same shall be so transferred, in like manner as if the proceedings under such fiat had been originally commenced therein by virtue of a fiat under the hand of the Lord Chancellor issued pursuant to the said recited act, or to this act, save as may be otherwise directed by this act; provided always, that nothing herein contained shall render invalid any proceedings which may have been had under any fiat in bankruptcy now subsisting, or which shall have been issued before this act shall come into operation, or affect or lessen any right, claim, demand, or remedy which any person now has thereunder, or upon or against any bankrupt against whom any such fiat has or shall have issued as aforesaid, except as herein specially enacted.

Power to appoint Official Assignees to act with the existing Assignees under such

53. And be it enacted, That it shall be lawful for the court which shall thenceforth act in the prosecution of such fiat, at its discretion, to appoint some one of the official assignees appointed or to be appointed under the said recited

act, or this act, to act with the existing assignees, if any, under such fiat, and to direct the existing assignees to pay and deliver over to such official assignee all monies, books, papers, and effects whatsoever in their possession or custody as such assignees, save where it shall be otherwise directed by the Lord Chancellor or by the court acting in the prosecution of such fiat, if authorized so to do by any general or other order of the Lord Chancellor; and all the real and personal estate of the bankrupt under such fiat shall immediately on such appointment vest in such official assignee jointly with the existing assignees, if any, in like manner as if the proceedings in the said bankruptcy had originally been commenced by virtue of this act, without prejudice to any action or suit commenced or any contract entered into by the existing assignees at the time of the passing of this act.

bankruptcies, and to whom the latter shall deliver over effects.

54. And be it enacted, That no official assignee shall be deemed personally responsible or liable for any act done by him or by his order or authority in the execution of his duty as such official assignee, by reason of the petitioning creditor's debt, trading, and act of bankruptcy upon which the adjudication of bankruptcy under such fiat shall have been grounded, or of any or either of such matters, being insufficient to support such adjudication.

To exempt official assignee from personal liability.

55. And be it enacted, That fourteen days before a final dividend shall be advertised under any bankrupt's estate, there shall be sent by the official assignee to each creditor's assignee of such estate a debtor and creditor account between the official assignee and such estate, showing also the monies remaining uncollected under such estate, and the cause of such monies remaining uncollected, a copy of which account shall be delivered to any creditor who shall apply for the same, and have proved or claimed a debt under such fiat, upon his applying for the same to the official assignee, and to any other person, such person, not being a creditor, paying such sum, not exceeding two shillings and sixpence, as shall be settled by the court authorized to act in the prosecution of such fiat.

Debtor and creditor account to be furnished by official assignee to creditors' assignee before final dividend.

56. And be it enacted, That there shall be paid, in like manner, by the official assignee of each bankrupt's estate to be administered in the country, the like sums as by the said recited act are directed to be paid by the official assignee of each bankrupt's estate to be administered in the Court of

Like sums to be paid under fiats prosecuted in the country as under fiats prosecuted in London.

Bankruptcy ; and such sums hereby directed to be paid shall be placed by the accountant in bankruptcy to the like accounts respectively, and be subject to the like orders and directions of the Lord Chancellor, to which the said sums mentioned in the said recited act are thereby directed to be placed and to be subject respectively.

Like sums to be paid on fiats moved into the Court of Bankruptcy, or into any of the country courts, under which the choice of assignees shall have taken place, as on commissions moved into the court of bankruptcy under like circumstances.

57. And be it enacted, That in all cases of fiats in bankruptcy which, by virtue of the provisions herein contained, shall be removed into the Court of Bankruptcy, or into any of the courts authorized to act in the prosecution of fiats in bankruptcy by virtue of this act, and under which the choice of assignees shall have taken place prior to the commencement of this act, there shall be paid, in like manner, by the assignees of every such bankrupt's estate, on every sitting under such bankruptcy, the like sum as by the said recited act is directed to be paid on every sitting in cases of commissions of bankrupt which, by virtue of the powers therein contained, should be removed into the said Court of Bankruptcy, and under which the choice of assignees should have taken place prior to the commencement of the said act ; and such sum hereby directed to be paid shall be placed by the said accountant in bankruptcy to the like account, and be subject to the like orders and restrictions, to which the said sum in that behalf mentioned in the said recited act is thereby directed to be placed and to be subject.

Compensation to such existing commissioners in the country as the Lords of the Treasury deem entitled thereto.

58. And whereas the duties of the several persons now acting as commissioners of bankrupt in districts and places for which such persons shall have been returned and appointed under the provisions of the said recited act, and the fees and emoluments accustomed to be received by them, will be abolished by the provisions of this act, and it may be just and necessary that in some such cases compensation should be made in respect of such fees so to be abolished ; be it enacted, That it shall and may be lawful for the Lords Commissioners of Her Majesty's Treasury, by examination on oath or otherwise, which oath they and each of them are and is hereby authorized to administer, to inquire into and ascertain the annual amount of the lawful fees and emoluments of such commissioners received by them, and to award to such one or more of the said commissioners as they shall deem to be entitled to the same an annuity or annuities, of such amount and for such term as the said Lords of the Treasury shall find to

be a fair and reasonable compensation for the loss to be sustained by such of the said commissioners, and shall certify the amount of such annuity, in writing under their hands, to the Lord Chancellor, who shall thereupon have power to order the amount so certified as payable to each such commissioner to be paid out of the monies standing to the credit of the accountant in bankruptcy in the Bank of England, to the account intituled "The Secretary of Bankrupts' Compensation Account," (but subject and without prejudice to the payment of all salaries and sums of money by any act or acts now in force authorized to be paid thereout), and the same shall be payable and paid accordingly to such respective persons aforesaid, without any deduction whatsoever: provided always, that the annual sum to be so payable to any commissioner shall not exceed two-thirds of the average annual amount of the sums (other than any sum or sums for travelling) received by them respectively as such commissioners for the last five years, or such portion of that period as any of them acted as a commissioner; and that such annuity shall not be paid to any commissioner, who at any time after the commencement of this act shall be appointed to hold any public office or employment of an annual value greater than the annuity to be so certified as payable to him, so long as any such office or employment shall be so held; and provided also, that no person shall be entitled to such compensation or allowance as aforesaid, whose appointment to his office was qualified by any condition or reservation expressed in his appointment, or otherwise made known to such person, that such office or the emoluments thereof were to be held and enjoyed subject to any future provisions to be made by Parliament touching the same, or without any claim to compensation in case the same should cease, or be subjected to any regulation.

59. And be it enacted, That it shall be lawful for Her Majesty, after the passing of this act, by a commission or commissions under the Great Seal, to appoint as many persons as Her Majesty shall think fit, not exceeding twelve persons, being serjeants or barristers at law of not less than seven years standing at the bar, to be commissioners of the court of bankruptcy, in addition to the present commissioners of the said court, to act in the prosecution of fiats in bankruptcy in the country, and that they and their successors shall take the

Her Majesty may appoint additional Commissioners of the Court of Bankruptcy to act in the prosecution of fiats in bankruptcy in the country, in such districts as Her Majesty in council shall think fit.

like oath before the Lord Chancellor as is at present administered to commissioners of the said court, and having once taken the said oath shall not be again required to take the same; and that any one or more of such additional commissioners shall and may form a district court of bankruptcy for the purpose of this act, and that every such court shall be authorized to act in the prosecution of fiats in bankruptcy in the country, at such place and in and for such district as Her Majesty, with the advice of her privy council, shall be pleased to direct; and that it shall be lawful for Her Majesty, with the advice aforesaid, to describe, and from time to time to alter, the limit and extent of such district as to Her Majesty shall seem fit: provided always, that nothing herein contained shall prevent the Lord Chancellor, when he shall deem it expedient, from directing any fiat in bankruptcy to the Court of Bankruptcy.

Her Majesty may appoint successors to additional commissioners.

60. And be it enacted, That upon the death, resignation, or removal from office of any of the said additional commissioners, or any of their successors, it shall be lawful for Her Majesty from time to time, by a commission under the great seal, to supply such vacancy.

Her Majesty may appoint additional deputy registrars for the country.

61. And be it enacted, That it shall be lawful for her Majesty, after the passing of this act, under her royal sign manual, from time to time to appoint any number not exceeding twelve deputy registrars, in addition to the present deputy registrars in the Court of Bankruptcy, to act as such in the country, and to attend upon and assist the said additional commissioners of the Court of Bankruptcy in the prosecution of fiats of bankruptcy in the country, in such manner as may be found most expedient for furthering such business, and as the Lord Chancellor shall from time to time by any order direct.

Additional commissioners and deputy registrars to hold their offices during good behaviour, and to be subject to like privileges, prohibitions, &c., as the present commissioners and deputy registrars.

62. And be it enacted, That the additional commissioners and deputy registrars to be appointed under this act shall hold their respective offices during their good behaviour, and that they shall be subject and liable to such and the like privileges, prohibitions, disabilities, prosecutions, penalties, and punishments as are by the said recited act imposed or directed with respect to the commissioners and deputy registrars appointed under such act; and the enactments therein contained in that behalf, except as otherwise directed by this act, shall extend and be applicable to the additional commis-

tioners and deputy registrars to be appointed under this act ; and that after the passing of this act, on the death, resignation, promotion, or removal of either of the two registrars for the time being of the Court of Bankruptcy, the vacancy thereby occasioned shall be filled up by such one of the deputy registrars for the time being appointed or to be appointed by virtue of the said recited act or of this act as the Lord Chancellor shall think fit to appoint.

63. And be it enacted, That the accountant in bankruptcy, the registrar and deputy registrars of the Court of Bankruptcy, and also the official assignees and the messengers and ushers of the said court, for the time being, shall be exempt and disqualified from being returned and from serving on any juries or inquests whatsoever, and shall not be inserted in any lists of men qualified or liable to serve as jurors, and that they shall also be exempt and disqualified from serving any parochial office whatsoever.

Accountant in bankruptcy, registrars, official assignees, &c. to be exempt from serving on juries, or in any parochial office.

64. And be it enacted, That from and after the passing of this act the Court of Review in bankruptcy may be formed by one judge of the said court.

The Court of Review may be formed by one judge of the court.

65. And be it enacted, That the judges of the Court of Review in bankruptcy shall take rank and precedence next after the judges of the superior courts of Westminster Hall.

Rank &c. of judges of Court of Review.

66. And be it enacted, That it shall be lawful for the Lord Chancellor, by any general or other order, whenever he shall think fit, to direct the court authorized to act in the prosecution of any fiat in bankruptcy to hear, determine, and make order in any matter in bankruptcy heretofore within the original jurisdiction of the Court of Review, or any judge of the said court ; provided nevertheless, that any such order shall be subject to be discharged, reversed, or altered by the Court of Review upon an appeal, and that any Commissioner of the Court of Bankruptcy authorized to act in the prosecution of any fiat directed to the Court of Bankruptcy shall be deemed and taken to be a court authorized to act in the prosecution of such fiat, and that all matters and duties by this act directed or authorized to be done and performed by the Court of Bankruptcy shall and may be done and performed by one or more of the commissioners appointed or to be appointed by virtue of the said recited act, and that every court authorized to act and acting in the prosecution of any fiat in bankruptcy now issued, or hereafter to be issued, or in

Jurisdiction of courts acting under fiats in bankruptcy.

execution of any duty imposed or to be imposed on such court by this or any other act hereafter to be in force, shall have, use, and exercise all the powers, rights, privileges, and incidents of a court of record.

Before whom affidavits are to be sworn.

67. And be it enacted, That all affidavits to be made or used in matters of bankruptcy, or under or by virtue of any statute relating to bankrupts or of this act, shall and may be sworn before the Court of Review, or before either of the subdivision courts in bankruptcy, or any commissioner, or the master or any registrar or deputy registrar of the Court of Bankruptcy, or master in ordinary or extraordinary of the high Court of Chancery, or in Scotland or Ireland before a magistrate of the county, city, town, or place where any such affidavit shall be sworn, or elsewhere before a magistrate, and attested by a notary, or before a British minister, consul, or vice-consul.

Court may take evidence *vid voce* or upon affidavit.

68. And be it enacted, That it shall be lawful for the said several subdivision courts, and the court authorized to act in the prosecution of any fiat in bankruptcy, in all matters within the jurisdiction of such respective courts, to take the whole or any part of the evidence either *vid voce* on oath, or upon affidavits to be sworn as aforesaid.

Costs may be awarded.

69. And be it enacted, That it shall be lawful for the said several subdivision courts, and the court authorized to act in the prosecution of any fiat in bankruptcy, in all matters before such courts respectively, to award such costs as to such courts shall seem fit and just; and, in all cases in which costs shall be so awarded against any person by any such court, it shall and may be lawful for such court to cause such costs to be recovered from such person in the same manner as costs awarded by a rule of any of the superior courts at Westminster may be recovered; and that the like remedies may be had upon an order of such court for costs, as upon a rule of any of the said superior courts for costs.

Rules to be made for regulating the forms of proceedings and practice to be observed in the courts authorized to act under fiats in bankruptcy.

70. And be it enacted, That it shall be lawful for the commissioners of the Court of Bankruptcy authorized to act in the prosecution of fiats in bankruptcy in London, or the major part of them, and such of the commissioners to be appointed under this act as shall be nominated by the Lord Chancellor for that purpose, to make from time to time, subject to the sanction and confirmation of the Lord Chancellor, general rules and orders for regulating the forms of proceed-

ings (where not provided for by this act) and the practice to be observed in every court authorized to act in the prosecution of fiats in bankruptcy.

71. And be it enacted, That the piece or parcel of ground described in and conveyed by the indenture of feoffment recited in an act made and passed in the first and second years of the reign of his late Majesty King George the Fourth, intituled "An Act to repeal so much of an Act of the Fifth Year of the Reign of his late Majesty King George the Second, relating to Bankrupts, as requires the Meetings under Commissions of Bankrupt to be holden in the Guildhall of the City of London, and for building Offices in the said City for the Meetings of the Commissioners, and for the more regular transaction of business in Bankruptcy," or expressed so to be, and all erections and buildings now or hereafter to be erected and built thereon, and the fee simple and inheritance thereof, shall from henceforth be and become, and remain and continue vested in her Majesty's commissioners for the time being of the Court of Bankruptcy acting in the prosecution of fiats in bankruptcy in London, and their successors, as commissioners of the said court, in trust for her Majesty, for the same intent and purpose as by the said act is enacted and declared concerning the commissioners and trustees thereby nominated; and the person or persons now being commissioners and trustees by virtue of the said act shall cease to be such commissioners or trustees; and the said commissioners for the time being of the said court, and their successors, shall and may in all things act in the further management, carrying on, and execution of the purposes and trusts of the said act, and with the like power and authority, to all intents and purposes, as is given by the said act to the commissioners and trustees therein named; and the clauses and provisions in the said act applicable to the commissioners and trustees therein named shall extend and be applicable to the said commissioners for the time being of the said court, in the further execution of the purposes and trusts of the said act.

Building for the transaction of business in bankruptcy in London vested in the commissioners of the Court of Bankruptcy for the time being appointed under 1 & 2 W.4.c.56. 1 & 2 G.4.c.115.

72. And be it enacted, That the building erected on the said piece or parcel of ground shall from and after the passing of this act be called the Court of Bankruptcy.

The building to be called the Court of Bankruptcy.

73. And be it enacted, That the registrar of the Court of Bankruptcy for the time being acting at the said court in

Registrar to enter in books an abstract of

all proceedings filed in the court, in a form to be sanctioned by the commissioners of the Court of Bankruptcy in London, and approved by the Lord Chancellor, with an alphabetical index.

Office of clerk of enrolments to Court of Bankruptcy on vacancy, to be abolished, and the duties to be performed by registrar in Basinghall Street.

Registrar to pay fees for entering fiats, &c. of record into the Bank of England, 2 & 3 W. 4, c. 114. s. 6.

Salaries to judge, commissioners, and other officers of the Court of Bankruptcy, to be paid out of the fund intituled "The Secretary of Bankrupts' Account."

Basinghall Street shall keep books in which he shall enter, in a form to be prepared by him, subject to the sanction of the commissioners of the Court of Bankruptcy acting in the city of London as aforesaid, or the major part of them, and approved of by the Lord Chancellor, an abstract of the proceedings filed in the Court of Bankruptcy, or such part thereof as shall be necessary to give a correct view of the estate to which such proceedings shall relate, and the management thereof, with an alphabetical index to each book, and a general alphabetical index to the whole of such books, which books shall be open to all concerned.

74. And be it enacted, That as and when any vacancy may occur by the death, removal, or retirement of the clerk of enrolments to the Court of Bankruptcy, such vacancy shall not be supplied, but the duties and business of such officer shall thenceforth be performed by the registrar of the Court of Bankruptcy acting in Basinghall Street as aforesaid, who shall, with respect to such duties and business, stand and be in the place of such officer to all intents and purposes whatsoever.

75. And be it enacted, That all such fees as are receivable by virtue of an act passed in the second and third years of the reign of his late majesty, intituled "An Act to amend the Laws relating to Bankrupts," and directed to be applied as therein mentioned, shall, from and after the death, removal, or retirement of the said clerk of enrolments, be received by the said registrar for the time being acting in Basinghall Street as aforesaid, and be paid by him, at such times as the Lord Chancellor shall by any order direct, into the Bank of England, to the credit of the accountant in bankruptcy, to the account intituled "The Secretary of Bankrupt's Account," and shall be applicable to all the purposes of the said account, and be subject to the like orders as other monies paid or directed to be paid in to the said account.

76. And be it enacted, That out of the fund placed to the credit of the accountant in bankruptcy, intituled "The Secretary of Bankrupts' Account," there shall be paid, by the Governor and Company of the Bank of England, by virtue of any order or orders of the Lord Chancellor to be from time to time made for that purpose, without any draft from the accountant in bankruptcy, the several salaries herein-after mentioned; that is to say, the net yearly sum of two thou-

and five hundred pounds to Sir John Cross, Knight, Judge of the Court of Bankruptcy, and his successors in the office of such judge; the net yearly sum of two thousand pounds to each commissioner of the said court appointed under the said recited act, and acting in the prosecution of fiats in bankruptcy in the city of London, and his successors in the office of such commissioner; the net yearly sum of one thousand eight hundred pounds to each commissioner of the said court to be appointed under this act to act in the prosecution of fiats in bankruptcy in the country, and his successors in the office of such commissioner; the net yearly sum of one thousand pounds to each registrar of the said court appointed under the said recited act, and his successors in such office; the net yearly sum of eight hundred pounds to each deputy registrar of the said court appointed under the said recited act, and acting as such in the city of London, and his successors in such office; and the net yearly sum of six hundred pounds to each deputy registrar of the said court to be appointed under this act to act as such in the country, and his successors in such office; which salaries shall be free from all taxes, deductions, and abatements whatsoever out of the same, or any part thereof, except the tax on income, and shall be paid quarterly, on the eleventh day of January, the eleventh day April, the eleventh day of July, and the eleventh day of October in every year, by equal portions; and the first of such payments to the said judge, and each commissioner, registrar, and deputy registrar, acting in London as aforesaid, or a proportionate part thereof, to be computed from the time of the passing of this act, or, as to any such officer appointed after the passing of this act, from the time of his appointment, shall be made on such of the same days of payment as shall first happen after the passing of this act, or date of the appointment of such officer, as the case may be; and the first of such payments to each commissioner and deputy registrar to be appointed under this act to act in the country as aforesaid, or a proportionate part thereof, to be computed from the time of the appointment of such commissioner and deputy registrar respectively, shall be made on such of the same days of payment as shall first happen after the date of such appointment; and that upon the resignation, death, or removal from office of any such judge, commissioner, registrar, or deputy registrar re-

spectively, such judge, commissioner, registrar, and deputy registrar respectively, or their respective executors and administrators, as the case may be, shall be paid such proportionate part of their respective salaries aforesaid as shall have accrued from the times of the commencement of such salaries respectively, or from the last quarterly day of payment thereof to the time of such resignation, death, or removal from office; and that the succeeding judge, commissioner, registrar, and deputy registrar respectively shall be paid such proportionate part of their respective salaries as shall be accruing or shall accrue from the day of the resignation, death, or removal from office of the preceding judge, commissioner, registrar, or deputy registrar respectively.

Power to Lord Chancellor to order retiring annuity to judge and commissioners of the Court of Bankruptcy and their successors.

77. And be it enacted, That it shall be lawful for the Lord Chancellor, by any order or orders of the Lord Chancellor to be made from time to time on a petition presented to him for that purpose, to order (if he shall so think fit) to be paid out of the interest and dividends that have arisen or may arise from the securities now or hereafter to be placed in the Bank of England to the account intituled "The Bankruptcy Fund Account," (but subject and without prejudice to the payment of all salaries and sums of money by any act or acts now in force directed or authorized to be paid thereout,) the annuities following; that is to say, an annuity or clear yearly sum of money not exceeding one thousand five hundred pounds to Sir John Cross, Knight, judge of the Court of Bankruptcy, or any of his successors in the office of such judge; an annuity or clear yearly sum of money not exceeding one thousand two hundred pounds to any commissioner of the Court of Bankruptcy appointed under the said recited act, or any of his successors in the office of such commissioner; an annuity or clearly sum of money not exceeding one thousand pounds to any commissioner of the Court of Bankruptcy to be appointed under this act, or any of his successors in the office of such commissioner, if and when any such judge or commissioner shall be afflicted with some permanent infirmity disabling him from the due execution of his office, and shall be desirous of resigning the same; and the annuity or clear yearly sum mentioned in any such order shall be paid by the Governor and Company of the Bank of England out of the interest and dividends of the said securities (but subject and without prejudice as afore-

said) by equal quarterly payments on the fifth day of January, the fifth day of April, the fifth day of July, and the tenth day of October in every year, to such judge or commissioner from the period when he shall resign his said office, for the term of his life, free from taxes, except the tax on income.

78. And be it enacted, That out of the interest and dividends that have arisen or may arise from the government or parliamentary securities now or hereafter to be placed in the Bank of England to the said account intituled "The Bankruptcy Fund Account," there shall be paid by the Governor and Company of the Bank of England, by virtue of any order or orders of the Lord Chancellor, to be made from time to time for that purpose, the salaries and sums following; that is to say, to the accountant in bankruptcy, such sum by way of salary as the Lord Chancellor shall direct, not exceeding the yearly sum of one thousand five hundred pounds, to be paid and payable in like manner and at such times as the salary heretofore payable to the accountant in bankruptcy, and such further annual sum as the Lord Chancellor shall think reasonable for the payment of such salaries as the Lord Chancellor shall direct to the clerks for the time now being, and their successors, and to such additional clerks to such accountant or to the registrar of the court of bankruptcy acting at the said court in Basinghall Street, as the Lord Chancellor shall deem fit to appoint; and authority is hereby given to the Lord Chancellor to appoint such clerks, and to reduce or increase the number of clerks to the said accountant or registrar as the occasion may be or require, the same salaries to be paid quarterly on such days and in such manner as the Lord Chancellor shall by any order in that behalf direct; and also, to such persons as the Lord Chancellor shall direct, such sum or sums of money as the Lord Chancellor shall think reasonable, for expenses to be incurred at any time after the passing of this Act, with the sanction and approval of the Lord Chancellor, in providing and keeping in repair courts in the country with necessary appurtenances for the purposes of this Act, or in alterations or improvements of the offices of the said accountant and of the registrars of the Court of Bankruptcy, or any other of the offices of the same court, for the purpose of rendering the same fit for the convenient reception and despatch of the business of such

Provision for salary of accountant in bankruptcy; for appointment of such additional clerks to such accountant, or to the registrar, as the Lord Chancellor may think fit;

and also for expenses to be incurred for the purposes of the Act

The courts provided for the purposes of this Act to vest in the respective commissioners.

Charge for the use of the court.

Warrants to be under hand and seal, and every summons to be in writing under the hand of a commissioner of the court.

How summons may be served where the party is keeping out of the way.

offices, and for the convenient occupation of the officers of the said court, and for the supply of law books for the use of the said court, or generally for such expenses in carrying this Act into effect as the Lord Chancellor may think fit; and also such annual sum or sums of money as the Lord Chancellor shall think reasonable for the rent of any buildings or rooms which by any order of the Lord Chancellor may be taken for any officers of the said court, or otherwise for the use of the said court, and for keeping up a necessary supply of books for the use of the said court; and the several courts which shall be provided by virtue of this Act, with the appurtenances and effects belonging thereto, shall vest in the respective commissioners to be appointed under this Act for the time being, forming such respective courts, and their successors in such office, in trust for the purposes of this Act: and there shall be charged to and paid out of the estate of the bankrupt under every fiat prosecuted in the country, for every sitting under such fiat, the sum of ten shillings, by way of charge for the use of the court, such charge to be received and accounted for and paid into the Bank of England to the account intituled "Interest arising from the Bankruptcy Fund Account," at such time and in such manner as the Lord Chancellor shall from time to time direct, and such charge to be subject to abolition or reduction as the Lord Chancellor may in his discretion think fit, having regard from time to time to the amount of the interest and dividends arising from the bankruptcy fund account, and the charges thereupon.

79. And be it enacted, That every warrant issued by any court authorized to act in the prosecution of fiats in bankruptcy shall be under the hand and seal of one of the commissioners acting in the prosecution of fiats in bankruptcy in such court; and every summons issued by any such court shall be in writing under the hand of one of such commissioners.

80. And be it enacted, That if in any case it shall be shown by affidavit to the satisfaction of the court authorized to act in the prosecution of any fiat in bankruptcy, by which a summons shall have been issued, that the party to whom such summons is directed is keeping out of the way, and cannot be personally served with such summons, and that due pains have been taken to effect such personal service, it shall be

lawful for the court by which such summons shall have been issued to order, by indorsement upon such summons, that the delivery of a copy of such summons to the wife, or servant, or some adult inmate of the house or family of the party, at his usual or last known place of abode or business, and explaining the purport thereof to such wife, servant, or inmate, shall be equivalent to personal service; and in every such case the service of such summons in pursuance of such order shall be and be deemed and taken to be of the same force and effect, to all intents and purposes, as if a copy of such summons had been delivered to the party in person.

81. And be it enacted, That any bankrupt or other person who shall, upon any examination upon oath or affirmation before the court authorized to act in the prosecution of any fiat in bankruptcy, or in any affidavit, or deposition, or solemn affirmation, authorized or directed by this or any other act relating to bankrupts, wilfully and corruptly give false evidence, or wilfully and corruptly swear or affirm any thing which shall be false, being convicted thereof, shall be liable to the penalties of wilful and corrupt perjury.

Punishment of persons giving false evidence, or swearing or affirming any thing which shall be false.

82. And be it enacted, That all sums of money forfeited under this act, or by virtue of any conviction for perjury committed in any oath hereby directed or authorized, may be sued for by the assignees of the estate and effects of any bankrupt in any of her Majesty's Superior Courts of Record, and the money so recovered (the charges of suit being deducted) shall be divided among the creditors.

Application of forfeitures.

83. And be it enacted, That all bills of charges, fees, and disbursements of any auctioneer, appraiser, broker, valuer, or accountant employed by any assignee or messenger or bankrupt under any fiat in bankruptcy, for business done under such employment, shall be settled by the court authorized to act in the prosecution of such fiat, and the amount of the bills so settled, and no more, shall be paid to or recoverable by such auctioneer, appraiser, broker, valuer, or accountant.

Charges of auctioneers, appraisers, valuers, and accountants, to be settled by the court.

84. And be it enacted, That it shall be lawful for the Lord Chancellor, by any order or orders of the Lord Chancellor, to be made from time to time on a petition presented to him for that purpose, to order (if he shall think fit) an annuity or clear yearly sum of money to be paid to any person executing the office of accountant in bankruptcy, or of registrar or deputy registrar under the said recited act or this act, not

Power to Lord Chancellor to order retiring pension to accountant in bankruptcy, registrars, &c.

exceeding two third parts of the yearly salary which such person shall under this act be entitled to at the time of presenting such petition, to be paid out of the interest and dividends that have arisen or may arise from the securities now or hereafter to be placed in the Bank of England to the account intituled "The Bankruptcy Fund Account," (but subject and without prejudice as aforesaid), if and when such person should be afflicted with some permanent infirmity disabling him from the due execution of his office, and shall be desirous of resigning the same; and the annuity or yearly sum mentioned in such order or orders shall be paid by the governor and company of the Bank of England, out of the interest and dividends of the said securities, (but subject and without prejudice as aforesaid), by equal quarterly payments, on the fifth day of January, the fifth day of April, the fifth day of July, and the tenth day of October in every year, to such person, from the period when he shall resign his said office, for the term of his life, free from taxes, except the tax on income.

Courts acting in the prosecution of fiats in bankruptcy to be auxiliary to each other for proof of debts and examination of witnesses.

85. And be it enacted, That the several courts authorized to act in the prosecution of fiats in bankruptcy by the said recited act or by this Act shall be auxiliary to each other for proof of debts, and for the examination of witnesses on oath, or for either of such purposes; and the court so acting as auxiliary in the prosecution of any fiat in bankruptcy in the examination of witnesses shall possess the same powers to compel the attendance of and to examine witnesses, and to enforce both obedience to such examination and the production of books, deeds, papers, writings, and other documents, as are possessed by the court to which such fiat is directed: provided always, that all such examinations of witnesses shall be taken down in writing, and shall be annexed to and form part of the proceedings under such fiat, and that no such proof of debts or examination of witnesses in the prosecution of any fiat shall be taken by any such auxiliary court, without the permission in writing of the court to which such fiat is directed.

Lord Chancellor may authorize any commissioner or deputy registrar of the court in London, or other qualified

86. And whereas the business in bankruptcy is liable to fluctuation: and whereas some one or more of the commissioners or deputy registrars of the court of bankruptcy appointed or to be appointed by virtue of the said recited act or of this Act may occasionally from illness or other reasonable

cause be absent, and it is expedient to make provision for such circumstances; be it enacted, That it shall be lawful for the Lord Chancellor (as occasion may require, and for such time as the Lord Chancellor shall think fit to allow), to authorize any one or more of the commissioners or deputy registrars respectively of the Court of Bankruptcy, appointed or to be appointed by virtue of the said recited act, or other person having the like qualification as is required by the said recited act for a commissioner or deputy registrar of the said court, to act in any district in the country, for or in aid of any one or more of the commissioners or deputy registrars respectively of the Court of Bankruptcy to be appointed by virtue of this Act, and so *vice versa*; and it shall also be lawful for the Lord Chancellor (as occasion may require, and for such time as the Lord Chancellor shall think fit to allow), to authorize any one or more of the commissioners or deputy registrars respectively to be appointed by virtue of this Act, and authorized to act under the provisions of this Act in any one district in the country, to act for or in aid of any one or more of the commissioners or deputy registrars respectively to be appointed by virtue of this Act, and authorized to act in any other district in the country; and that any commissioner or deputy registrar respectively of the said court, or other person so acting as aforesaid, shall have all the power, jurisdiction, and authority, and perform all the duties of the commissioner or deputy registrar respectively for or in aid of whom such commissioner or deputy registrar shall so act.

87. Provided always, and be it enacted, That any commissioner or deputy registrar of such court, or other person so acting for or in aid of any commissioner or deputy registrar thereof, shall have paid to him (and in the case of a commissioner or deputy registrar so acting, in addition to his salary as such commissioner or deputy registrar), by the governor and company of the Bank of England, by virtue of any order or orders of the Lord Chancellor to be made from time to time for that purpose, out of the interest and dividends that have arisen or may arise from the said securities now or hereafter to be placed in the Bank of England to the said account intituled "The Bankruptcy Fund Account," (but subject and without prejudice as aforesaid), such sum of money, in the case of any commissioner or deputy registrar so acting, for travelling and other expenses, and in the case of any other

person, to act for or in aid of any country commissioner or deputy registrar, and *vice versa*; or any country commissioner or deputy registrar of one district to act for or in aid of any country commissioner or deputy registrar of any other district, as may be required.

Travelling expenses, &c. of commissioners to be paid out of "The Bankruptcy Fund Account," and the amount thereof to be in the discretion of the Lord Chancellor.

person so acting, for services, travelling, and other expenses, as the Lord Chancellor shall deem fit.

Secretary of bankrupts to receive and account for a certain fee.

88. And be it enacted, That it shall be lawful for the Lord Chancellor's secretary of bankrupts for the time being and his clerks, and he and they are hereby respectively authorized and required, to receive and take the fee or sum of two shillings and sixpence for every certified copy of declaration of insolvency, and the amount to be so received shall be by the said secretary carried to the account of the first schedule of fees annexed to the said recited act, and be applied to the purposes of the said schedule.

Fees to be taken and accounted for by the chief registrar.

89. And be it enacted, That it shall be lawful for the chief registrar of the Court of Bankruptcy for the time being, and his clerks, and he and they are hereby respectively authorized and required, to receive and take the several fees and sums set forth in the schedule of fees hereto annexed, in respect of the business therein specified, which shall be transacted in London, and the amount to be so received shall be by him accounted for and applied in payment of such salaries and sums of money to clerks, ushers, and other under officers of the Court of Bankruptcy in London as the Lord Chancellor may from time to time direct and appoint, and the yearly surplus (if any) of such monies shall be divided between the two registrars and the deputy registrars of the said court acting in London in such proportions as the Lord Chancellor shall appoint.

Fees to be taken and accounted for in the country district courts.

90. And be it enacted, That there shall be received and taken in the several courts authorized to act in the prosecution of fiats in bankruptcy in the country the several fees and sums in the said schedule of fees hereto annexed, in respect of the business therein specified which shall be transacted in the country; and that all such fees shall be accounted for and paid over to the chief registrar of the Court of Bankruptcy acting in London, and shall be by him accounted for and applied in payment of such salaries and sums of money to ushers and other under officers of such courts in the country as the Lord Chancellor may from time to time direct and appoint, and the yearly surplus (if any) of such monies shall be divided between the several deputy registrars of such courts in the country in such proportions as the Lord Chancellor shall appoint.

Power to Lord

91. Provided always, and be it enacted, That the Lord

Chancellor shall have the like power to abolish or reduce the fees mentioned in the said schedule of fees hereunto annexed, and to provide for the salaries and sums hereby made payable out of the said fees, as he now has to abolish or reduce the fees mentioned in the second schedule of fees annexed to the said recited act and to provide for the salaries and sums by the said recited act made payable out of the said last-mentioned fees; and it is hereby further provided, that on or before the first day of March one thousand eight hundred and forty-four, if parliament be then sitting, or if not, within fourteen days from the commencement of the then next session of parliament, there shall be laid before parliament by the chief registrar of the Court of Bankruptcy for the time being a return, made up to the thirty-first day of December then last, of the total amount of fees received by or accounted for to him under the provisions of this act, and of the application of such fees, and a like return shall be afterwards made annually at the same period for the then preceding year up to the thirty-first day of December then last.

Chancellor to
reduce fees.

92. And be it enacted, That on or before the first day of March in every year if parliament be then sitting, or if not within fourteen days from the commencement of the then next session of parliament, there shall be laid before parliament by the following officers the following returns; that is to say, by the accountant in bankruptcy, a return showing the total amount of monies paid into the Bank of England to the credit of the accountant in bankruptcy and of every bankrupt's estate during the year preceding and up to the thirty-first day of December in that year, and also the total amount of monies paid out under every bankrupt's estate during the same period by orders of court or of any judge or commissioner of the Court of Bankruptcy, and also the balances on the said thirty-first day of December in the Bank of England standing to the credit of the accountant in bankruptcy and of every bankrupt's estate; and by every official assignee, whether appointed under the provisions of the said recited act or of this Act, a return showing the total amount of his receipts and payments as such official assignee during the year preceding and up to the thirty-first day of December in that year upon every estate under his charge as such official assignee, and also the balances appearing in or by the books of such official assignee to be then in the Bank of England standing to the

Returns to be
made to parliament
annually
by accountant
in bankruptcy
and by official
assignees.

credit of the accountant in bankruptcy and of every such estate, and also the balances of every such estate then in the hands or under the power or control of such official assignee, and also the several sums allowed to such official assignee for remuneration and for petty expenses under every such estate, such last-mentioned return to be certified by the court to which such official assignee shall be attached, and both such returns to be subject to such further regulations as to the form of the same, or otherwise, as the Lord Chancellor shall from time to time think fit to make.

Construction of
Act.

93. And be it enacted, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows: that is to say, the words "her Majesty" shall mean also, and include the heirs and successors of her Majesty; and the words "Lord Chancellor" shall mean also and include the Lord Chancellor, lord keeper and lords commissioners for the custody of the great seal of the united kingdom for the time being; and the words "fiat or fiats, or fiat in bankruptcy or fiats in bankruptcy," shall mean also and include any commission of bankrupt; and the word "month" shall mean a calendar month; and the word "oath" shall include affirmation, where by law such affirmation is required or allowed to be taken in place of an oath; and the word "Bank of England" shall include all branches thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing, and bodies corporate as well as individuals; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and that this Act shall extend to aliens, denizens, and women, both to make them subject thereto and to entitle them to all the benefits given thereby; and that this Act shall not extend either to Scotland or Ireland, except where the same are expressly mentioned; and that this Act shall be construed in the most beneficial manner for promoting the benefit of creditors of bankrupts and the ends hereby intended.

94. And be it enacted, That this Act or any of the provisions thereof may be amended, altered, or repealed by any act or acts to be passed in this present session of parliament. Act may be amended, &c. this session.

SCHEDULES referred to by the foregoing Act.

SCHEDULE (A).

No. 1.

Affidavit for summoning a Trader Debtor.

A. B. of and *C. D.* of severally make oath and say, and, first, this deponent *A. B.* for himself saith, that *E. F.* is justly and truly indebted to this deponent in the sum of pounds, for, &c. [*stating the nature of the debt with certainty and precision*]; and this deponent further saith, that the said *E. F.*, as this deponent verily believes, is a trader within the meaning of the statutes relating to bankrupts, or some or one of them, and resides at ; and that an account in writing of the particulars of the demand of the said *A. B.*, amounting to the said sum of pounds, with a notice thereunder written in the form prescribed by the statute in that case made and provided, purporting to require immediate payment of the said debt, is hereunto annexed; and this deponent *C. D.* for himself saith, that he did, on the day of instant [*or last*], personally serve the said *E. F.* with a true copy of the said account and notice.

Sworn, &c.

No. 2.

Particulars of Demand, and Notice requiring Payment.

To *E. F.* of

The following are the particulars of the demand of the undersigned *A. B.* of against you the said *E. F.*, amounting to the sum of pounds. [*Here copy the account.*]

Take notice, that I the said *A. B.* hereby require immediate payment of the said sum of pounds. Dated this day of in the year of our Lord .

(Signed) *A. B.*

No. 3.

Summons of Trader Debtor.

These are to will and require you to whom this warrant is directed personally to be and appear before the Court of Bankruptcy, to be holden in Basinghall Street, in the city of London [or at in the county of], on the day of at o'clock; and you are hereby informed that the purpose for which you are thus summoned to appear before the said Court is to ascertain, in manner and form prescribed by the statute in that case made and provided, whether or not you admit the demand of *A. B.* of (who claims of you the sum of pounds for a debt), or any and what part thereof, or whether you verily believe that you have a good defence to the said demand, or to any and what part thereof; and hereof you are not to fail at your peril. Given under my hand the day of in the year of our Lord . (Signed) *J. K.*
Commissioner.

SCHEDULE (B).

No. 1.

Admission of Debt by Trader Debtor.

Court of Bankruptcy,
Basinghall Street, London,
[or at in the county of]
day of

Whereas I, the undersigned *E. F.* of am summoned to appear before this Honourable Court for the purpose of stating, in manner prescribed by the statute in that case made and provided, whether or not I admit the demand of *A. B.* of (who claims of me the said *E. F.* the sum of pounds for a debt), or any and what part thereof, or whether I verily believe that I have a good defence to the said demand, or to any and what part thereof; be it known, that I the said *E. F.* hereby confess that I am indebted to the said *A. B.* in the said sum of pounds [or in part of the said sum of pounds, that is to say, in the sum of pounds].
(Signed) *E. F.*

No. 2.

*Deposition by Trader Debtor of belief of good Answer to
Creditor's Demand, or some Part thereof.*

Court of Bankruptcy,
Basinghall Street, London,
[or at in the county of]
day of A. D.

E. F. of being sworn, on the day and year and at the
place aforesaid, upon his oath saith, that he verily believes
he has a good defence to the demand [or to pounds,
part of the demand], hereinafter mentioned of *A. B.* of
who claims of the said *E. F.* the sum of pounds, for a
debt alleged to be due and owing from the said *E. F.* to the
said *A. B.*, as stated in the affidavit of the said *A. B.*, filed
in this Honourable Court, and bearing date the day of

Sworn before me,

J. K., Commissioner. (Signed) *E. F.*

SCHEDULE (C).

Admission of Debt by Trader Debtor signed out of Court.

I, the undersigned *E. F.* of do hereby confess that
I am indebted to *A. B.* of in the sum of pounds.

(Signed) *E. F.*

Dated this day of A.D.

Witness,

G. H., attorney for the said *E. F.*,
and subscribing witness to the ex-
ecution hereof as such attorney.

SCHEDULE (D).

Declaration of Insolvency by Trader.

I, the undersigned *E. F.* of do hereby declare that
I am unable to meet my engagements. Dated this day
of in the year of our Lord

(Signed) *E. F.*

Witness,

G. H., attorney of the
Court of

SCHEDULE (E).

The Schedule of Fees.

| | £. | s. | d. |
|---|----|----|----|
| On filing every fiat | 0 | 1 | 0 |
| For every summons of trader debtor under this act | 0 | 1 | 0 |
| On allowance of every bond, with sureties | 0 | 5 | 0 |
| For every rule or order nisi under this act | 0 | 5 | 0 |
| For every rule or order absolute under this act .. | 0 | 5 | 0 |
| For every search warrant | 0 | 5 | 0 |
| On swearing every affidavit, except of the bankrupt or relating to his certificate | 0 | 1 | 6 |
| For every order of Court made in any matter heretofore within the jurisdiction of the Court of Review | 1 | 0 | 0 |
| For every certificate of bankrupt's conformity .. | 0 | 6 | 6 |
| On entering every appeal for hearing in the Court of Review | 0 | 2 | 0 |
| For every Order pronounced by that Court..... | 1 | 5 | 0 |
| For every previous minute of Order | 0 | 2 | 6 |
| For entering every matter for hearing in a Subdivision Court | 0 | 1 | 0 |
| For every Order pronounced there | 0 | 5 | 0 |
| For fees on the trial of every issue, to be paid by the successful party | 2 | 0 | 0 |
| For every search made in the Court..... | 0 | 1 | 0 |
| For filing affidavits and other documents..... | 0 | 1 | 0 |
| For copies of affidavits, orders, and other proceedings, per folio of ninety words | 0 | 0 | 1½ |
| For every subpoena ad testificandum and other writ issued out of the Court | 0 | 2 | 0 |

ORDER IN COUNCIL,

*Made in pursuance of the provisions of the 5 & 6 Vict.
c. 122.*

Gazetted 4th November 1842.

WHEREAS by a statute, made at the Parliament holden in the 5th and 6th years of the reign of her present Majesty, intituled "An Act for the Amendment of the Law of Bankruptcy," it was enacted, amongst other things, that it should be lawful for her Majesty, after the passing of that act, by a commission or commissions under the great seal, to appoint as many persons as her Majesty should think fit, not exceeding twelve persons, being serjeants, or barristers-at-law of not less than seven years' standing at the bar, to be Commissioners of the Court of Bankruptcy, in addition to the present Commissioners of the said court, to act in the prosecution of fiats in bankruptcy in the country; and that any one or more of such additional Commissioners should and might form a District Court of Bankruptcy for the purpose of the said act; and that every such court should be authorized to act in the prosecution of fiats in bankruptcy in the country at such place, and in and for such district, as her Majesty, with the advice of her Privy Council, should be pleased to direct; and that it should be lawful for her Majesty, with the advice aforesaid, to describe, and from time to time to alter, the limit and extent of every such district as to her Majesty should seem fit: and whereas her Majesty has appointed twelve additional Commissioners of the Court of Bankruptcy to act in the prosecution of fiats in bankruptcy in the country, and it is expedient to settle the districts in and for which such Commissioners shall so act, and to describe the limit and extent of every such district; her Majesty is therefore pleased, by and with the advice of her Privy Council, to order and direct, and it is hereby ordered

and directed, that for the purpose of the said recited act, there shall be seven districts in the country, and that such several districts shall be called respectively the names following—that is to say,

| | |
|--------------------------|--------------------------|
| The Manchester district, | The Bristol district, |
| The Leeds district, | The Exeter district, and |
| The Liverpool district, | The Newcastle-upon-Tyne |
| The Birmingham district. | district. |

And it is hereby further ordered and directed that district courts of bankruptcy shall be authorized to act in the prosecution of fiats in bankruptcy in the country in and for such several districts at the several places hereinafter in that behalf mentioned—that is to say,

In and for the Manchester district, at Manchester.

In and for the Leeds district, at Leeds.

In and for the Liverpool district, at Liverpool.

In and for the Birmingham district, at Birmingham.

In and for the Bristol district, at Bristol.

In and for the Exeter district, at Exeter.

In and for the Newcastle-upon-Tyne district, at Newcastle-upon-Tyne.

And it is hereby further ordered and directed, that the limit and extent of such several districts, for the purpose of the said recited act, shall be as hereinafter described—that is to say,

MANCHESTER DISTRICT.

The Manchester district shall comprehend all places included within, or to be considered as forming parts of, the northern division of the county of Chester, as the same is settled and described by a statute made at the Parliament holden in the second and third years of the reign of his late Majesty King William IV., intituled "An Act to settle and describe the Divisions of Counties, and the Limits of Cities and Boroughs, in England and Wales, in so far as respects the Election of Members to serve in Parliament," and all places included within, or to be considered as forming parts of, the northern division of the county of Derby, as the same is settled and described by the said last-mentioned act; and the following places, in the county of Lancaster, that is to say,

ORDER IN COUNCIL.

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Blackburn,
Clitheroe,
Lancaster,
Preston,
Ashton under-Line,
Bolton-le-Moors,
Bury,

Manchester,
Oldham,
Rochdale,
Salford,
Warrington, and
Wigan ;

and also all other places locally situated in the said county of Lancaster, and which are on the eastern side of any of the several railways hereinafter mentioned, and commonly understood by the following names, that is to say,

The Grand Junction Railway,
The North Union Railway, and
The Lancaster and Preston Junction Railway ;

or which are northward, eastward, or westward of Lancaster aforesaid, or westward or northward of the river Lune.

And it is hereby further ordered and directed, that the several places, in the said county of Lancaster hereinbefore expressly named, shall include the place or places respectively, which are comprehended within the boundaries of every such place, as such boundaries are settled and described by the said last-mentioned act.

LEEDS DISTRICT.

The Leeds district shall comprehend all places locally situated in the county of York ; and all the places included within, or to be considered as forming part of, the northern division of the county of Nottingham, as the same is settled and described by the said last mentioned act ; and all places locally situate in the parts of Lindsey, in the county of Lincoln.

LIVERPOOL DISTRICT.

The Liverpool district shall comprehend all places included within, or to be considered as forming parts of, the southern division of the county of Chester, as the same is settled and described by the said last mentioned act ; and all such places locally situated in the county of Lancaster as will not be included in the Manchester district hereinbefore described ; and all places locally situated in any of the several counties in Wales hereinafter next mentioned, that is to say,

APPENDIX.

The county of Anglesea,
The county of Carnarvon,
The county of Denbigh,
The county of Flint,

The county of Merioneth,
and
The county of Montgomery.

BIRMINGHAM DISTRICT.

The Birmingham district shall comprehend all places locally situated in any of the several counties hereinafter next mentioned, that is to say,

The county of Warwick, The county of Salop,
The county of Worcester, The county of Stafford, and
The county of Hereford, The county of Leicester;
and all places locally situated in the parts of Kesteven and Holland, in the county of Lincoln; and all places included within, or to be considered as forming parts of, the southern division of the county of Nottingham, as the same is settled and described by the said last-mentioned act; and the town and county of the town of Nottingham; and all places included within, or to be considered as forming parts of, the southern division of the county of Derby, as the same is settled and described by the same act.

BRISTOL DISTRICT.

The Bristol district shall comprehend all places locally situated in the county of Gloucester; and all places locally situated in the county of Monmouth; and all places included within, or to be considered as forming parts of, the northern division of the county of Wilts, as the same is settled and described by the said last-mentioned act: and all places included within, or to be considered as forming parts of, the eastern division of the county of Somerset, as the same is settled and described by the same act; and the county of the city of Bristol, and all places within the limits of the city of Bristol, as the same are described in the said last-mentioned act, and all places locally situated in any of the several counties in Wales hereinafter next mentioned, that is to say,

The county of Brecon,
The county of Cardigan,
The county of Carmarthen,

The county of Glamorgan,
The county of Pembroke, and
The county of Radnor.

EXETER DISTRICT.

The Exeter district shall comprehend all places locally situated in the county of Devon; and all places locally

situated in the county of Cornwall; and all places included within, or to be considered as forming parts of, the western division of the county of Somerset, as the same is settled and described by the said last-mentioned act; *and all places* locally situated in the *county of Dorset, excepting* the several places in the same county hereinafter next mentioned, that is to say,—

Poole,
Wimborn Minster,
Blandford,

Sturminster, and
Shaftesbury;

and excepting also all other places locally situated in the said county of Dorset, which are situated within the distance of 100 miles from the General Post-office, in the city of London; and the several places hereinbefore and hereinafter next mentioned, *that is to say, Poole and Shaftesbury*, shall include the place or places, respectively, which are comprehended *within the boundaries of each such place*, as such boundaries are settled and described by the said last-mentioned act.

NEWCASTLE-UPON-TYNE DISTRICT.

And the Newcastle-upon-Tyne district shall comprehend all places locally situated in any of the several counties hereinafter mentioned, that is to say,

The county of Northumber-
land,
The county of Durham,
The county of Cumberland, &

The county of Westmore-
land,
And also the town of Berwick-
upon-Tweed.

Provided always, and it is hereby further ordered and directed, that if any part of any county hereinbefore mentioned, which is detached from the main body of such county, but for which no sufficient provision is hereinbefore made, shall be surrounded by two or more counties or divisions, or ridings, or parts, then every such detached part shall be considered as forming part of the county or division, riding, or parts, with which such detached part shall have the longest common boundary.

And the Right Hon. the Lord High Chancellor of Great Britain is to give the necessary directions herein accordingly.

C. C. GREVILLE.

The London District will be as follows :—

| | |
|----------------------------------|--------------|
| MIDDLESEX, | OXFORDSHIRE, |
| HERTS, | BERKS, |
| KENT, | BUCKINGHAM, |
| SURREY, | BEDFORD, |
| SUSSEX, | NORTHAMPTON, |
| HAMPSHIRE, | HUNTINGDON, |
| WILTS—(SOUTHERN DIVISION) | RUTLAND, |
| DORSET—All within 100 miles from | CAMBRIDGE, |
| London, and including the | NORFOLK, |
| Towns of Poole, Wimborn | SUFFOLK, |
| Minster, Blandford, Stur- | ESSEX. |
| minster and Shaftesbury, | |

IN MATTER OF BANKRUPTCY.

ORDER made by the Right Hon. John Singleton Lord Lyndhurst, Lord High Chancellor of Great Britain, in Pursuance of the Statute 5th and 6th Victoria, Chap. 122.—November 12, 1842.

I do hereby order and direct as follows, that is to say:—

I. That every fiat in bankruptcy hereafter granted shall be forthwith issued and transmitted by the Lord Chancellor's secretary of bankrupts to the court to which such fiat shall be directed in manner hereinafter in that behalf mentioned; that is to say, every such fiat directed to the Court of Bankruptcy shall forthwith be sent, by a messenger to be appointed by the said secretary for that purpose, to the office of the chief registrar of such court at the said court in Basinghall Street, and there delivered by such messenger; and every such fiat directed to any district court of bankruptcy shall forthwith be sent (except where the Lord Chancellor shall by any special order hereafter otherwise direct) through the General Post-office to the deputy-registrar or deputy registrars of such district court.

II. That every commission of bankrupt and every fiat in bankruptcy heretofore issued and directed to any commissioners in the country, and opened, or purporting by the proceedings to have been opened, at any place situated within

any one of the several districts in the country mentioned in, and settled and described by, an order bearing date the 2nd of November, 1842, and made by her Majesty, by and with the advice of her privy council, in the pursuance of an act of parliament passed in the parliament holden in the fifth and sixth years of the reign of her present Majesty, intituled "An Act for the Amendment of the Law of Bankruptcy," or directed to any commissioners in the country heretofore authorized to act in the prosecution of fiats in bankruptcy at or for any such place and within twenty miles thereof, but not opened, shall be and the same is hereby transferred and removed into the District Court of Bankruptcy authorized to act in the prosecution of fiats in bankruptcy in the country within the district in which such place shall be situate; and every commission of bankrupt and every fiat in bankruptcy heretofore issued and directed to any commissioners in the country, and opened, or purporting by the proceedings to have been opened, in the country elsewhere than at any place situated within any one of the said several districts so settled and described as aforesaid, or directed to any commissioners in the country heretofore authorized to act in the prosecution of fiats in bankruptcy elsewhere than at or for any such place, but not opened, shall be and the same is hereby transferred and removed into the Court of Bankruptcy in London; and all further proceedings in every commission and fiat so transferred and removed as aforesaid shall be thenceforth prosecuted and carried on in manner directed by the said act in the court to which the same is hereby ordered to be transferred and removed.

III. That forthwith, after the registering in any District Court of Bankruptcy of any commission or fiat in bankruptcy opened since the passing of the act of the 1 & 2 Will. 4, c. 56., and at every public sitting of the Court thereafter under such commission or fiat, and forthwith after the advertisement of the adjudication, and every public sitting thereafter, under every fiat hereafter opened in any District Court of Bankruptcy, minutes of such commission and fiat and of the proceedings shall be transmitted by the Court acting in the prosecution of such commission or fiat to the Court of Bankruptcy in London, to be there kept and filed among the records of the said Court, in manner following; that is to say, a minute of the commission or fiat and proceedings shall be made from

time to time in the form hereinafter set forth, so far as the same may be applicable, by the deputy-registrar, and certified by him as correct, and the deputy-registrar shall cause such minute to be sent by the post to the chief-registrar of the Court of Bankruptcy in Basinghall Street, who shall file the same among the records of such Court :—

Form of Minute of Commission or Fiat and Proceedings.

Bankrupt.—[State the name and description of the bankrupt, or bankrupts, as in the commission or fiat.]

Date of commission or fiat.

Petitioning creditor.—[Name, &c., as in the commission or fiat.]

Solicitor.—[Name, &c., as in the commission or fiat.]

Date of Adjudication.— day of , 184 .

Date at which Gazetted.— day of , 184 .

Official assignee.—[Name and date of appointment.]

Creditors' assignees.—[Names, &c., as in choice paper, and date of choice.]

Solicitor (if changed).—

Amount of debts proved at first meeting or sitting.—

Ditto, claimed.—

Last examination.—[Date of]

Adjourned to [or *sine die*.]

[or passed.]

(And, in addition to the above, under fiats where last examination hereafter passed, the amount of creditors' debts, of liabilities, and of assets, as disclosed in the balance-sheet.)

Certificate.—[Date and particulars (if any deemed material) of granting the same.]

Audit.—Date of day of , 184 .

(From Audit or Dividend Paper.)

Gross receipts £

Net receipts £

(And, in addition to the above, from Accounts hereafter audited :)

Amount of solicitor's bills :—

1st bill £

2nd bill £

&c., &c., £

Total. .£

Amount of messenger's bills :—

| | | | | | |
|-----------|----|----|----|----|---|
| 1st bill | .. | .. | .. | .. | £ |
| 2nd bill | .. | .. | .. | .. | £ |
| &c., &c., | .. | .. | .. | .. | £ |

Court fees :—

Total..£

| | |
|--|---------|
| To secretary of bankrupts' account | £ |
| To compensation account | £ |
| Rent and taxes | £ |
| Wages in full | £ |
| Remuneration charge for official as-
signee | £ |
| Allowance to bankrupts | £ |
| Postages and petty expenses | £ |
| Dividend.—Date of day of , 184 | |

(From Dividend Paper.)

| | |
|-------------------|---------------|
| Gross sum divided | £ |
| Rate of dividend | in the pound. |
| Balance retained | £ |

(And, in addition to the above, where dividend hereafter
declared:)

Reason for retaining balance.

A similar return at every subsequent sitting for audit or
dividend.

Like returns as above where there are separate estates for
each bankrupt.

IV. That every sum directed to be paid under section 57
of the 5 & 6 Vict. c. 122, or under section 47 of the 1 & 2
Will. 4. c. 56, shall be taken by the deputy-registrar of the
Court authorized to act in the prosecution of the commission
or fiat under which such sum shall be payable; and an
account of all sums so taken shall be kept by such deputy-
registrar, and such sums shall be certified by the commis-
sioner to correspond with the number of sittings, and be
paid by the deputy-registrar monthly into the Bank of Eng-
land, or in the country into one of the branches thereof, or
such other bank as shall be named by the Bank of England
for that purpose, to the credit of the accountant in bank-
ruptcy, to be carried to the account intituled, "The Secretary
of Bankrupts' Account," and the voucher for such payment
shall be produced to the commissioner within one week
thereafter.

V. That the sum directed by the 5 & 6 Vict. c. 122. s. 77. to be charged to and paid out of the estate of the bankrupt under every fiat prosecuted in the country, for every sitting under such fiat, shall be received by the deputy registrar of the court authorized to act in the prosecution of such fiat; and a separate account of all sums so received shall be kept by the deputy registrar; and such sums shall be certified by the commissioner to correspond with the number of sittings, and be paid by the deputy registrar, monthly, into one of the branches of the Bank of England, or such other bank as shall be named by the Bank of England for that purpose, to the account intituled, "Interest arising from the Bankruptcy Fund Account."

VI. That printed copies of this order shall be supplied by the Lord Chancellor's Secretary of Bankrupts to the several courts authorized to act in the prosecution of fiats in bankruptcy in London and in the several districts in the country, and to the chief registrar of the Court of Bankruptcy in Basinghall-street, and one copy shall be posted up in some conspicuous place in every such court, and in the office of the chief registrar.

LYNDHURST, C.

GENERAL RULES and ORDERS made under the 5 & 6 Vict. c. 122. s. 70. for Regulating the Forms of Proceedings (where not provided for by the said Act), and the Practice to be observed in every Court authorized to act in the Prosecution of Fiats in Bankruptcy.—12th November 1842.

It is ordered as follows, that is to say:—

I. After the expiration of one calendar month from the date of these rules and orders, no attorney or solicitor shall be allowed to practise in any District Court of Bankruptcy, until he shall have been admitted and enrolled as an attorney or solicitor of the Court of Bankruptcy in manner prescribed by the general rules and orders made for regulating the practice of the said Court, and bearing date the 12th of January 1832.

II. Every commission or fiat in bankruptcy transferred to

the Court of Bankruptcy in London under the provisions of the act of parliament, holden in the 5 & 6 Vict. c. 122, s. 52, shall, before or forthwith after any proceeding thereupon in such Court, be registered in the office of the chief registrar in Basinghall Street in a book to be kept for that purpose, and allotted by ballot to one of the commissioners of such Court, in the same manner as fiats directed to such Court are now allotted, or in such other manner as the commissioners shall from time to time direct.

III. Every fiat issued after the commencement of the aforesaid act, and directed to the Court of Bankruptcy in London, shall, forthwith after the delivery of the same at such Court, be filed of record in the office of the chief registrar in Basinghall Street, and a minute of the date of so filing the same shall be made at the time in writing at the foot of such fiat; and such fiat shall not be opened upon the application of any other creditor than the petitioning creditor until after the expiration of three days from such date.

IV. Every commission or fiat in bankruptcy transferred to any District Court of Bankruptcy under the provisions of the act 5 & 6 Vict. c. 122. s. 52., shall, before or forthwith after any proceeding thereupon in such Court, be registered by a deputy registrar attending such Court in a book to be kept for that purpose, and in districts where there are two commissioners shall be allotted by ballot, in the presence of the solicitor acting under such commission or fiat, or in rotation in such manner as the commissioners shall from time to time direct, to one of such commissioners, and shall be further prosecuted before such commissioner, or before the district commissioner, where there is only one commissioner: provided always, that either of the commissioners authorized to act in the prosecution of fiats in bankruptcy in any district in the country may, in the absence of the other commissioner, sit or act for him.

V. Every fiat issued after the commencement of the aforesaid act, and directed to any District Court of Bankruptcy, shall forthwith after the delivery of the same at such Court be registered by a deputy registrar attending such Court in a book to be kept for that purpose, and a minute of the date of registering the same shall be made at the time in writing at the foot of such fiat; and such fiat shall not be opened upon the application of any other creditor than the petition-

ing creditor until after the expiration of three days from such date; and such fiat shall be allotted by ballot, or in rotation, and prosecuted as directed with respect to a commission or fiat transferred to such Court, subject to the like proviso in case of the absence of a commissioner.

VI. The present practice in the Court of Bankruptcy, where not inconsistent with or otherwise directed by the aforesaid act or these rules and orders, shall, until further order, be followed in such Court, and in every District Court of Bankruptcy: and every proceeding in any District Court of Bankruptcy, where not by the aforesaid act or herein specially provided for, shall, until further order, be in the same form, *mutatis mutandis*, and the paper thereof of the same size as is now used in the Court of Bankruptcy in London, and shall be kept in such District Court, unless and until directed by the Lord Chancellor to be transmitted to the Court of Bankruptcy in London,

VII. Every attorney or solicitor of the Court of Bankruptcy having in his custody or power the proceedings under any fiat in bankruptcy, opened, or purporting by the proceedings to have been opened, at any time after the passing of the act 1 & 2 Will. 4. c. 56. shall forthwith bring such fiat and proceedings into the Court of Bankruptcy or District Court of Bankruptcy into which such fiat shall have been transferred and removed (as the case may be), to be registered in such Court, and further prosecuted therein, as hereinbefore in that behalf directed.

VIII. The deputy registrar attending the commissioner shall take minutes and have the charge of all proceedings before him, and otherwise assist in the business of the Court, subject in all cases to the control of the commissioner.

IX. Every application by a petitioning creditor to extend the time for opening any fiat shall be supported by affidavit to be filed in Court.

X. In every case where the time for opening any fiat shall be extended under 5 & 6 Vict. c. 122. s. 4. the commissioner shall forthwith cause notice to be sent by the post to the Lord Chancellor's secretary of bankrupts of the extended time allowed by the Court.

XI. In every advertisement of an adjudication of bankruptcy in the London Gazette, the date of the fiat under

which such adjudication shall have been made shall be stated.

XII. The personal attendance of the petitioning creditor, and of the witness or witnesses to prove the trading and act of bankruptcy upon the opening of the fiat, shall in no case be dispensed with, except upon special cause proved to the satisfaction of the commissioner.

XIII. If any person adjudged bankrupt intend to dispute such adjudication, such person shall cause notice of his intention so to do to be served upon the petitioning creditor or his solicitor, and the deputy registrar of the Court, two days at the least before the day of showing cause against such adjudication.

XIV. The bankrupt's balance-sheet must be filed in duplicate with the deputy registrar of the Court ten days at least before the day appointed for the last examination of the bankrupt, or the adjournment day thereof for that purpose (one copy for the official assignee, and the other for the proceedings); and the last examination of the bankrupt shall in no case be passed by the Court unless his balance-sheet shall have been duly filed as aforesaid; office copies of the balance-sheet, or of such part thereof as shall be required, shall be provided by the proper officer.

XV. Every bill of fees and disbursements and charges of any solicitor or attorney, or messenger, under any commission or fiat in bankruptcy, incurred prior to any sitting for an audit under such commission or fiat, shall be delivered to the deputy registrar for taxation five days at least before the day appointed for such sitting; and, in default thereof, if such sitting shall be adjourned by reason of such default, such solicitor or attorney, or messenger, shall pay the costs occasioned by the adjournment, and the amount thereof shall be deducted from the amount of such bill; and no money shall be paid to any solicitor or attorney, or messenger, on account of any fees or disbursements or charges of any bill, until such bill shall have been taxed.

XVI. The audit account of the official assignee, or of any creditors' assignee or assignees, shall be made out in the ordinary form of a debtor and creditor account, each item thereof being entered according to its date, and a name, date, and proper explanation given to such item; and a duplicate of

such account shall be sent by the official assignee to the solicitor two days at least prior to the day appointed for the auditing of such account, subject to the power of the commissioner to require an account, digested under proper heads, to be annexed to the audit account, if he shall think proper.

XVII. At every audit the debtor and property book exhibited to the Court by the official assignee shall be carefully examined and compared with the debts and property collected as stated in the audit paper, and the cause of any monies remaining uncollected shall be ascertained, and a minute thereof made, and filed with the proceedings; and all persons appearing to be indebted to the bankrupt's estate shall be forthwith summoned and examined in that behalf upon oath, and the examination so taken shall be filed with the proceedings; and such directions shall be given by the court as to any further proceedings thereupon as to the court shall seem fit.

XVIII. No audit and dividend shall be appointed for the same day, except for some special cause, to be stated to the Court in writing at the time of such appointment, and allowed.

XIX. Under every fiat issued within six months before the commencement of the aforesaid act, or hereafter to be issued, a final dividend shall be advertised within two years after the date of such fiat; and under every commission or fiat issued 12 months or more prior to the commencement of the aforesaid act a final dividend shall be advertised within 18 months after the commencement of the aforesaid act, unless, in either of the cases aforesaid, there be some cause to the contrary to the satisfaction of the commissioner, to be stated in writing, and filed with the proceedings.

XX. The particulars of demand and notice under the aforesaid act, and specified in schedule A. (No. 2), shall, in cases where the debt demanded is claimed to be due to a partnership firm, be signed by or in the name of one of the partners, on behalf of himself and partner or partners, adding after such signature the style or firm of partnership and place of business as follows:—(that is to say), " John Thompson, for self and partners, trading under the style or firm of
at in the county of ;" and in cases where the debt demanded is claimed to be due to any one person, or to two or more persons not being partners in

trade, such particulars of demand and notice shall be signed by or in the name of every such person by his Christian and surname, and his or their residence or place of business, as follows; that is to say, "Edward Jones, residing at in the county of , " or "carrying on business at in the county of ."

XXI. Such particulars and notice shall be directed to the party or parties intended to be summoned by the Christian and surname of each of them (or, when the Christian name is not known, then by the initial letter or letters, or some contraction of the Christian name, and by the surname), and also by the place of residence, in the same form as mentioned in the last rule, and shall also contain in the body thereof a statement of the name or names of all the persons from whom the debt is claimed to be due, whether the whole of them shall be summoned or not, or (in case of partners) the style or firm of partnership, and place of business, in the same form as mentioned in the same rule.

XXII. The account in such particulars of demand shall be expressed with reasonable and convenient certainty, as to dates and all other matters; and where credit is given in such account to the debtor, the notice shall require payment of the difference, or balance only, which appears to be due on such account.

XXIII. If the affidavit for summoning a debtor under the said act shall not be filed within one calendar month after service of the particulars of demand and notice, the plaintiff (or creditor) shall not afterwards be at liberty to proceed, without serving new particulars of demand and notice.

XXIV. Every affidavit under the said act shall be intituled of "The Court of Bankruptcy in London," or "The Court of Bankruptcy for the District" (as the case may be).

XXV. Every affidavit for summoning a debtor under the said act shall state the nature of the debt with the same degree of certainty and precision, as is now required in an affidavit to hold to bail by order of a judge in the superior courts of Westminster.

XXVI. Every summons of a debtor under the said act shall describe the parties in the same manner as they were described in the particulars of demand and notice.

XXVII. Every such summons shall be endorsed with a notice as follows :—

“ Notice to the party summoned.

“ This summons is served upon you pursuant to the provisions of the 5th and 6th Victoria, c. 122., intituled ‘ An Act for the Amendment of the Law of Bankruptcy,’ and is founded on an affidavit of debt which was filed in the Court of Bankruptcy in London (or the Court of Bankruptcy for the District) at on the day of 184 .

“ If you shall fail to appear in person to this summons at the time and place within specified (having no lawful impediment made known to and proved to the satisfaction of the said Court at the same time, and allowed), and if you also fail within fourteen days after service of this summons, or within such enlarged time as the said Court may grant, to pay, secure, or compound for the demand within mentioned to the satisfaction of the summoning creditor, or enter into a bond with two sureties, to be approved of by the said Court, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for recovery of the same, together with such costs as shall be given in such action, you will be deemed to have committed an act of bankruptcy on the 15th day after the service of this summons, provided a fiat in bankruptcy shall issue against you within two calendar months from the filing of the above-mentioned affidavit.

“ If you shall appear, and on appearance shall refuse to sign an admission of the said demand in the form required by the said act, and shall not make a deposition on your oath, in the form required by the said act, that you believe you have a good defence to such demand, and shall also fail within 14 days after service of this summons, or within such enlarged time as aforesaid, to pay, secure, or compound as abovementioned, or to enter into such bond as abovementioned, the same consequence will follow as in the case first supposed, subject to the same proviso as regards the issuing a fiat in bankruptcy.

“ If you shall appear, and on appearance shall sign an admission of the said demand, and shall not within 14 days next after the filing of such admission pay, or tender and offer to pay, to the said creditor the amount of such demand,

or secure or compound for the same to the satisfaction of such creditor, you will be deemed to have committed an act of bankruptcy on the 15th day after the filing of such admission, subject to the same proviso as before-mentioned with regard to the issuing a fiat in bankruptcy.

“If you shall appear, and on appearance shall sign an admission for part of the said demand, and shall not make a deposition on your oath in form required by the said act, that you believe you have a good defence to the residue, then if, as to the sum so admitted, you shall not, within 14 days next after the filing of such admission, pay, or tender and offer to pay, to the said creditor the sum so admitted, or secure or compound for the same to the satisfaction of such creditor, and as to the residue of such demand shall not within 14 days from the service of the summons, or such enlarged time as may be granted by the said Court in that behalf, pay, secure, or compound for the same to the satisfaction of such creditor, or enter into a bond, with two sureties, to be approved of by the Court, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for recovery of the same, together with such costs as shall be given in such action, you will be deemed to have committed an act of bankruptcy on the fifteenth day after the service of this summons; subject to the same proviso as before mentioned with regard to the issuing the fiat in bankruptcy.

“If you shall appear, and on appearance shall, as to the whole of the said demand, or part of it, make a deposition on your oath, in the form required by the said act, that you believe you have a good defence to the same, you will be entitled to a discharge from the summons.

“You are moreover to observe that an admission made by you after the service of this summons, though signed out of Court, may afterwards be filed in Court, and will be as effectual as if you had appeared and signed it in Court, provided there be present at the time of the signature an attorney of one of her Majesty’s superior courts of law on your behalf, expressly named by you, and attending at your request, to inform you of the effect of such admission before it is signed by you; and provided also that such attorney do subscribe his name to the admission as a witness, and in such attestation declare himself to be attending for you, and state therein

that he subscribes as such attorney ; and provided also, that the admission be in the following form :—

“ ‘ I the undersigned E. F., of in the county of do hereby confess that I am indebted to A. B., of , in the sum of

“ ‘ Signed, E. F.

“ ‘ Dated this day of 184 .

“ ‘ Witness G. H., attorney for the said E. F., and subscribing witness to the execution hereof as such attorney.’ ”

XXVIII. Every summons of a debtor under the said act shall be endorsed with the name and place of residence (according to the form of specifying name and place directed by rule 20) of the attorney actually suing out the same : and in case such attorney shall not be an attorney of the Court of Bankruptcy, then also with the name and place of residence (according to the same form) of the attorney of such Court in whose name the summons shall be sued out ; but in case no attorney shall be employed for the purpose, then with a memorandum expressing that the same has been sued out by the summoning creditor “ in person.”

XXIX. Every such summons shall be served four days at least before the time for appearance therein mentioned.

XXX. Every such summons shall be served between the hours of nine o'clock in the forenoon and nine o'clock in the evening.

XXXI. If the plaintiff (creditor) shall make default in appearance at the time appointed in that behalf, the defendant (debtor) shall be entitled to his discharge from the summons; and a memorandum of such discharge shall be endorsed on the summons.

XXXII. If the defendant shall appear at the time appointed in that behalf, and shall refuse to admit such demand, but shall, as to the whole of the said demand, or part of it, make a deposition on oath, in the form required by the said act, that he believes he has a good defence to the same, the defendant shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be endorsed on the summons.

XXXIII. Any want of compliance on the part of the plaintiff with these rules and orders in the particulars of demand and notice, and in the affidavit for summoning the defendant, and in the summons and service thereof, or in

any or either of such matters, may be waived by the defendant, or if made known to and proved to the satisfaction of the Court, at the time required by the summons for the appearance of the defendant, shall be deemed and taken to be a good objection to requiring the defendant to state whether or not he admits the demand sworn to by the plaintiff, or any part thereof; and in such case, if such want of compliance be not waived, the defendant shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be endorsed on the summons.

XXXIV. Every application to enlarge the time for calling on the defendant to state whether or not he admits the demand or any part thereof, or for entering into a bond, with sureties, shall be supported by affidavit.

XXXV. Before any defendant shall be allowed to enter into a bond, with sureties, according to the provisions of the said act, he shall give to the plaintiff, or his attorney, a notice in writing, signed by the defendant, or his attorney, of the defendant's intention so to proceed.

XXXVI. Such notice of sureties shall be accompanied with a true copy of the affidavit of sufficiency, which affidavit shall be in the following form, viz :—

“ In the Court of Bankruptcy, London,
(or “ in the Court of Bankruptcy for the District”)

“ Between and

“ A. B. of in the, &c., and C. D. of, &c. (*adding their place of residence respectively, according to the particulars set forth in Rule 21*), severally make oath and say : and, first, the said A. B. for himself saith, that he is one of the proposed sureties for the abovenamed defendant, and that he the said A. B. resides at aforesaid, and that he is worth property to the amount of £ over and above what will pay and satisfy all his just debts and incumbrances: [that he is not surety in any manner for the abovenamed defendant, or any other person, except on the present occasion] (*or, if he is surety on any other occasion, substitute for the words between the brackets the following, ‘and every other sum for which he is now surety’*); that his, the said A. B.’s property, to the amount aforesaid, consists of (*here specify the nature and value of the property according to the circumstances of the case as follows*) stock in trade in his business of a , carried on by him at , of the value of ; of good

book debts owing to him to the amount of ; of furniture in his house at of the value of ; of a freehold (or "leasehold") farm of the value of , situated at occupied by : or of a dwelling-house of the value of , situated at , occupied by ; or of other property, particularizing each description of property, with the value thereof. And the said A. B. further saith, that for the last six months he has resided at aforesaid (or, *if he has resided at several places, then say 'at the following places,' particularizing them according to the form of describing places directed by Rule 21*). And the abovenamed deponent C. D., for himself saith, that (*here pursue the same form as with respect to the former surety*)."

XXXVII. The amount of property so sworn to shall be the sum demanded, fractional parts of a pound excepted, and one-fourth more.

XXXVIII. The plaintiff shall be at liberty, within four days after service of notice of sureties, to except to the proposed sureties or either of them, by delivering a written notice to the defendant or his attorney, to the effect generally that he excepts to such surety (or sureties, as the case may be).

XXXIX. Two days after the service of such notice of exception, the defendant or his attorney shall attend at eleven o'clock in the forenoon in open court, with the bond duly stamped, and with an affidavit by the subscribing witness of the execution of such bond; and the plaintiff or his attorney shall be at liberty to oppose the sureties or either of them, upon affidavit, or on the ground of any defect appearing on the face of the proceedings.

XL. The bond shall be taken in a penal sum, to be the amount of double the sum demanded, and shall be executed by the defendant and both sureties to the plaintiff, and the form of the condition shall be as follows:—

"Whereas the said (*plaintiff*) and one C. D., by their affidavit, sworn and filed in the Court of Bankruptcy (or, "in the District Court of Bankruptcy at "), on the day of , 184 , according to an act passed in the session of parliament holden in the fifth and six years of the reign of Queen Victoria, intituled, &c., severally deposed as follows—that is to say, the deponent (*plaintiff*) for himself said (*here set forth the affidavit for summons*); and whereas the said

Court did, upon the filing of such affidavit, issue a summons according to the said act, which was duly served on the said (*defendant*) on the day of , in the year 184 : and whereas the said (*defendant*) upon his appearance to the said summons (*or* "at an enlargement or adjournment of the said summons," *as the case may be*), refused to admit such demand, and made no deposition, according to the said act, that he believed he had a good defence to such demand (*or* "signed an admission for part only of such demand, viz., the sum of , and did not make a deposition, according to the said act, that he believed he had a good defence to the residue of such demand"); and whereas the said (*defendant*) has requested the said (*sureties*), as sureties for him, to join him in the present obligation, conditioned as hereinafter appearing, to which they have consented; and the said (*defendant*) has given notice thereof to the said (*plaintiff*): * [and whereas the said plaintiff hath brought an action at law for recovery of the said demand (*or* "of the residue of the said demand," *as the case may be*)] : now the condition of the above-written obligation is such, that if the said (*defendant*), his executors or administrators, shall pay such sum or sums to the said (*plaintiff*), his executors, administrators, or assigns, as shall be recovered in [the said action, or] any [other] action which [may have been brought, or] shall hereafter be brought for the recovery of the said demand [or "the said residue of the said demand," *as the case may be*], together with such costs as shall be given in the same; then the present obligation shall be void, otherwise it shall be and remain in full force and virtue."

XLI. Where no notice of exception is served, the defendant or his attorney shall attend in open court on the sixth day after the service of notice of sureties, at eleven o'clock in the forenoon, with the bond and affidavit of execution aforesaid, and also with an affidavit of the service of notice of sureties, and an office copy of the affidavit of sufficiency.

XLII. All affidavits used in Court shall be filed.

XLIII. In all cases in which any particular number of days is above described, or shall be mentioned in any of these rules and orders, or any other rule or order of Court, for the doing of any act, the same shall be reckoned, in the absence

* If no action be brought, omit the parts between the brackets.

of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusive of that day also.

XLIV. Any writ of attachment, or other writ issued by a Sub-division Court, or Court authorized to act in the prosecution of any fiat in bankruptcy, on an order of such Court, for the non-payment of costs, on the deputy registrar's *allocatur*, shall be sealed with the seal of the Court of Bankruptcy by the chief registrar of such Court in Basinghall-street.

XLV. Printed copies of these rules shall be supplied by the Lord Chancellor's secretary of bankrupts to the several Courts authorized to act in the prosecution of fiats in bankruptcy in London, and in the several districts in the country, and to the chief registrar of the Court of Bankruptcy in Basinghall-street; and one copy shall be be pasted up in some conspicuous place in every such Court, and in the office of the chief registrar.

| | | |
|------------------------|---|----------------|
| C. F. WILLIAMS, | } | Commissioners. |
| J. H. MERIVALE, | | |
| JOSHUA EVANS, | | |
| JOHN S. M. FONBLANQUE, | | |
| R. G. C. FANE, | | |
| EDWARD HOLROYD, | | |
| HENRY J. STEPHEN, | | |
| EDMUND ROBT. DANIELL, | | |
| Approved, | | |

LYNDHURST, C.

OFFICIAL ASSIGNEES.

ORDER made by the Right Hon. John Singleton, Lord Lyndhurst, Lord High Chancellor of Great Britain, relating to Official Assignees under the provisions of the Statute passed in the Parliament holden in the 5th and 6th Years of the reign of Her present Majesty, intituled "An Act for the Amendment of the Law of Bankruptcy."—November 12, 1842.

It is ordered as follows, that is to say,—

I. That each official assignee appointed, to act as official assignee in bankruptcies prosecuted in the country, shall find

ORDER.—OFFICIAL ASSIGNEES.

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security to the like amount, and be subject to the same rules in relation thereto, as the official assignees appointed to act in bankruptcies prosecuted in the city of London.

II. That each official assignee, appointed to act as such in bankruptcies prosecuted in the country, shall be subject to the like prohibition not to carry on any trade or business, or hold or be engaged in any office or employment other than his said office and employment of official assignee, as the official assignees appointed to act in bankruptcies prosecuted in the city of London.

III. That until further order, the commissioner in the country shall appoint his official assignees to act in rotation under the several bankruptcies prosecuted before him, unless, in any case, the commissioner shall see cause to the contrary.

IV. That this order in the several matters hereinafter mentioned shall from henceforth, except in matters otherwise herein specially directed, apply to every official assignee, whether acting under bankruptcies prosecuted in London or in the country, and to every such bankruptcy.

V. That the official assignee shall, on the 1st day of January in every year, or within one week then next following, make a declaration in writing, to be filed with the chief registrar of the Court of Bankruptcy in Basinghall-street, that to the best of his knowledge and belief his sureties are alive and solvent, and in such declaration state, to the best of his knowledge and belief, any change of residence of any or either of such sureties.

VI. That the official assignee shall enter in a book, to be called the register estate book, the names of the bankrupts in the commissions and flats, to which he shall have been or shall be appointed.

VII. That the official assignee shall keep the following set of books, in size and form hereinafter referred to; that is to say, register estate book (No. 1); register book of bankrupts' books, delivered to official assignee under each estate (No. 2); debtor and property book; rough cash book; fair cash book; rough journal, fair journal (for bills of exchange, securities, &c.); ledger; letter book; petty cash and postage book; audit book.

The size of such several books, and of any other books kept by the official assignee in his official capacity, and the

form of entry in all such books, to be settled by the accountant in bankruptcy.

VIII. That the official assignee, forthwith after his appointment under any bankrupt's estate, shall sort and number the books, papers, and writings of the bankrupt, with the number of the estate, in the register estate book, and the number of each book, thus :—

(54. The number of the estate in the register estate book.)

(75. The number of the book, paper, or writing received by the official assignee.)

and the official assignee shall file a list thereof, with the proceedings, and shall also forthwith after his appointment deliver to the bankrupt a written notice or letter in the form specified in the schedule hereunto annexed (No. 1.)

IX. That the official assignee shall direct, in the form specified in the schedule hereunto annexed (No. 2), the payment of all monies due to any bankrupt's estate from any one person, or from two or more persons being partners, and carrying on business or residing in England, and exceeding in amount the sum of 500*l.*, and all monies being in the hands or under the control of any assignee or assignees chosen by the creditors of any bankrupt's estate to which such official assignee shall have been appointed, into the Bank of England, to the credit of the accountant in bankruptcy, and for the particular estate to which such money shall belong.

X. That when any money shall be paid into the Bank of England, pursuant to the directions aforesaid, the party so paying such money shall receive a certificate in the form specified in the schedule hereunto annexed (No. 3), from one of the cashiers of such bank, of his paying the same, and of its being placed to the account of the accountant in bankruptcy for the proper estate, and a voucher for such payment to be sent by the bank on the same day to the said accountant.

XI. That as soon as conveniently may be after every such payment the accountant in bankruptcy shall certify in writing to the proper official assignee that such payment has been made, and the name of the bankrupt or bankrupts to the credit of whose estate the money has been placed in the books kept in the office of the accountant in bankruptcy.

XII. That the accountant in bankruptcy and the governor and company of the Bank of England are hereby authorized to make from time to time such further regulations, to be

settled by one or more of the commissioners of the Court of Bankruptcy acting in London, and subject to the approval of the Lord Chancellor, for facilitating the making of such payments, and certifying the same to the official assignee, as to them shall seem meet.

XIII. That no official assignee shall keep under his control upon any one estate more than 100*l.*, or, in the aggregate of monies of bankrupts' estates, more than 1,000*l.*, and any excess beyond such sum shall be paid by him forthwith into the Bank of England.

XIV. That the official assignee, at the time of paying any monies into the Bank of England, shall state in writing, delivered therewith to the cashier of the bank, in the form specified in the schedule hereunto annexed (No. 4), the date and amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts to whose estate the money belongs, and that it is to be placed to the credit of the accountant in bankruptcy; and the official assignee shall take a receipt for the same from the cashier of the bank, and on the same day carry or transmit it to the office of the accountant in bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt or bankrupts in the books kept in the office of the accountant in bankruptcy, such voucher to be produced when called for by the Court.

XV. That all monies without exception received by the official assignee, and not paid by him forthwith into the Bank of England to the credit of the accountant in bankruptcy, shall be paid by the official assignee, as soon as they shall amount to 100*l.*, into the hands of a banker, with whom such official assignee shall keep an account as such official assignee, such account to be entitled as official assignee, and in which account no monies shall be entered except such as are received by the official assignee in his official capacity.

XVI. That all monies paid into the Bank of England to the credit of the accountant in bankruptcy for the estate of any person adjudged bankrupt, or in matters of bankruptcy, shall be subject to the order of a commissioner of the Court of Bankruptcy, in writing under his hand, and testified by a deputy-registrar as to the application thereof; provided that every such order shall specify the amount of any payment to

be made by such order, the purpose to which it is to be applied, and the name of the official assignee to whom the same is to be made for such purpose, and in cases where the sum to be paid exceeds 500*l.*, the name of the person beneficially entitled (to whom in such case the payment shall be made); and the accountant in bankruptcy shall and may, pursuant to such order, pay the sum of money specified therein out of such bankrupt's estate by a draught, subscribed to and on the same paper with the said order; such order and draught to be in the form specified in the schedule hereunto annexed (No. 5).

XVII. That all orders by the commissioner for payment of money, or for the transfer and sale (as hereinafter provided) of any stock or securities, being part of a bankrupt's estate, be signed in triplicate, and that one copy of any such order be filed with the proceedings in bankruptcy, and that one copy be left with the Bank of England, and that one copy be left with the accountant in bankruptcy.

XVIII. That the official assignee shall, before any audit, enter in the book called the debtor and property book the names of all the debtors to the bankrupt's estate, as returned in his balance-sheet, and shall state the reasons why debts are not paid on the opposite page; such book to be produced to the court at every audit.

XIX. That each official assignee shall deposit in the Bank of England, to the credit of the accountant in bankruptcy, all bills, notes, and other negotiable instruments, except unaccepted bills of exchange, as soon as he shall receive the same; and shall deposit in like manner all unaccepted bills of exchange as soon as the same shall have been accepted or refused acceptance; and shall at the time of such deposit leave a statement in writing with the cashier of the Bank of England specifying the date and contents of the instruments so deposited, the name of the official assignee making such deposit, the name and description of the bankrupt or bankrupts, and the particular estate to which the same respectively belong, and that such instruments respectively are to be deposited to the credit of the said accountant in bankruptcy; and shall also take a receipt for the same from the cashier of the Bank, and carry or transmit it to the office of the said accountant in bankruptcy, who will give a proper voucher, to be produced when called for by the Court.

That when and as soon as any bill, note, or other negotiable

instrument, deposited as aforesaid in the Bank of England in the name of the said accountant, shall become due, the governor and company of the Bank of England shall, without any direction from the said accountant, deliver such bill, note, or other negotiable instrument to one of the cashiers of the Bank, who is to present the same for payment, and receive the sum of money due thereon, and forthwith to pay the sum so received, if any, into the Bank of England, to be there placed to the credit of the said accountant.

That in case any such bill, note, or other negotiable instrument shall not be paid, the said governor and company of the Bank of England shall cause such bill, note, or other negotiable instrument, as is by law required to be noted and protested, to be delivered to a notary for that purpose, and to be noted and protested accordingly, and shall, after the same shall have been so noted and protested, as the case may be, again deposit the same in the Bank of England, to the credit of the said accountant.

And that the said governor and company of the Bank of England are forthwith, after every such receipt of money or deposit of any note, bill, or other negotiable instrument, to certify to the said accountant the sum of money received, if any, on each such bill, note, or negotiable instrument, and placed to the credit of the said accountant, or that such bill, note, or negotiable instrument has been dishonoured; and such dishonoured bill, note, or other negotiable instrument, shall be forthwith delivered by the Bank to the proper official assignee.

And that as often as any bill, note, or other negotiable instrument, that shall have come to the hands of any official assignee, shall have been or shall be dishonoured, such official assignee shall forthwith give such notice thereof as is by law required from the holder of such bill, note, or other negotiable instrument respectively.

XX. That any one of the commissioners of the Court of Bankruptcy, acting in the prosecution of any fiat in bankruptcy, may from time to time make order relative to the delivery out to an official assignee of any bill of exchange or promissory note which may stand in the Bank of England to the credit of the accountant in bankruptcy for the estate under such fiat; provided that the purpose of such delivery be stated in the order, and such order be testified by a deputy-registrar.

XXI. That any one of the commissioners of the Court of Bankruptcy, acting in the prosecution of any fiat in bankruptcy, may, as often as it shall appear to him expedient, by order under his hand in the forms specified in the schedule hereunto annexed (Nos. 6, 7, and 8), direct any money, which may have been paid into the Bank of England on account of the estate of the bankrupt named in such fiat, to be invested in the purchase of Exchequer bills, to be lodged in the Bank of England, and may in like manner direct the sale or exchange of such Exchequer bills, and also the exchange, sale, or transfer of any stock in the public funds or in any public company, or of any Exchequer bills, India Bonds, or other public securities which shall have been transferred, delivered, or paid into the Bank of England on account of such bankrupt's estate, and may direct the proceeds thereof to be laid out in the purchase of Exchequer bills, and that such Exchequer bills, when so purchased, be deposited in the Bank of England to the credit of the said accountant for such particular estate; and the said accountant shall and may, pursuant to such order, make such sale, purchase, or transfer, without any further order or direction; and the expenses thereof may be charged to the account of the estate, for the benefit of which the same shall have been respectively made.

Provided always, that the signature of the commissioner be attested by a deputy-registrar, and that the order of the accountant in bankruptcy be subscribed to the order of the commissioner, and on the same paper with the said order.

Provided further, that no stock or public fund be transferred upon any sale, and that no Exchequer bill, India Bond, or public security be delivered for the purpose of sale, except to a cashier of the Bank of England, until the price or value thereof be paid into the Bank of England to the credit of the accountant in bankruptcy for the particular estate to which it belongs; and that no sum be paid for the purchase of any Exchequer bill, India Bond, or other public security, until such Exchequer bill, India Bond, or public security be deposited in the Bank of England to the credit of the said accountant in bankruptcy, and for such particular estate.

XXII. That the official assignee shall, within one week after the declaration of a dividend, give notice by advertisement in the London Gazette, and to each creditor by a printed cir-

cular letter in the form specified in the schedule hereunto annexed (No. 9), to be sent through the Post-office at the cost of the bankrupt's estate, to be settled by the commissioner, of the time and place of the delivery of the dividend warrants as hereinafter provided; and that at such time the official assignee will require the production of such securities, if any, as the creditor exhibited at the time of his proof; and that no dividend warrant will be delivered to the creditor holding any security for his debt, until such security shall be produced, without the special directions of a commissioner in that behalf.

XXIII. That this order, so far as relates to the mode of payment of dividends, shall commence and take effect on the 2d day of January next; and that no dividend under any bankrupt's estate, to which an official assignee shall have been appointed, shall be declared by any district Court of Bankruptcy until after the said 2d day of January.

XXIV. That when a dividend has been or may be declared, the solicitor to the estate shall forthwith make out three lists of the creditors in alphabetical order, and shall state, in separate columns, after the name of each creditor, the amount of his debt, and the dividend to which he is entitled, and in two of such lists the securities exhibited at the time of proof, and shall, to each name prefix a number in regular series, together with the date of the order of dividend, according to the form in the schedule hereunto annexed, (Nos. 10 and 11), and shall sign such several lists, and shall cause one of such lists which specifies such securities to be filed with the proceedings, and the other of such lists which specifies the securities he shall deliver to the official assignee together with the list not specifying the securities; and the official assignee shall examine and sign the several lists, if correct, and shall prepare books, at the expense of the estate, containing as many blank warrants as may be necessary, according to the form in the schedule hereunto annexed (No. 12) for London, and (No. 13) for the country, and shall number and fill up a warrant for each dividend, and insert in each warrant the name of the creditor to which the number of such warrant is prefixed in the list, and the dividend payable to him, and shall keep the list specifying the securities in his custody, and shall take or send the books containing such warrants, to-

gether with the list not specifying the securities, to the accountant in bankruptcy, who shall ascertain that the amount of such warrants does not exceed the sum standing in his name to the credit of the bankrupt's estate, and shall compare the warrants with the list, and if correct shall certify the same, by affixing the seal of his office, to be provided for that purpose, in the margin of the warrants; and he shall keep in his custody the list of creditors, and return the warrants to the official assignee, for delivery to the creditors as hereinafter mentioned.

XXV. That when a creditor, or any person duly authorized under his hand to receive his dividend warrant, shall apply for the same, the official assignee shall require the production of such securities, if any, as the creditor exhibited at the time of his proof, and, if satisfied that the amount of the said dividend still remains due, shall fill up the date in the warrant and receipt, and upon the creditor or such other person authorized as aforesaid signing the receipt, the official assignee shall mark the securities (if any) with the amount of that dividend, and shall sign and deliver the warrant for the same; provided that no dividend warrant shall be delivered to any creditor holding any security for his debt, until such security shall be produced: Provided that upon the statement of a creditor that he is unable to produce his security, and that the same has not been parted with for any valuable consideration, nor assigned to any person, he shall be examined on oath before a commissioner as to the cause of such inability, and his examination shall be filed with the proceedings, and the commissioner shall adjudge whether in his opinion the creditor is or is not able to produce the security; and if the commissioner is of opinion that the security cannot for a sufficient cause be produced, the creditor shall give a sufficient indemnity to the official assignee, to be approved by the commissioner, and, upon such indemnity being given, the official assignee shall deliver the dividend warrant to the creditor.

XXVI. That the payment of the dividend warrant may be obtained by the creditor, or any person duly authorized by him under his hand to receive his dividend, or by the executor or administrator of any such creditor, upon production of the dividend warrant at the office of the account-

ant in bankruptcy, or, in a country bankruptcy, at any branch of the Bank of England, or such other bank as shall be named by the Bank of England in that behalf.

That if any other person than the creditor or person duly authorized by him, or the executor or administrator of any such creditor, claim to receive the dividend, the person so claiming the same must obtain an order for payment thereof endorsed upon the warrant by a commissioner under his hand; and if any dividend warrant be above twelve months' date, a like order for payment thereof by a commissioner shall be required: provided always, that in no case shall any dividend warrant be paid to an official assignee, unless such official assignee be the payee, or the executor or administrator of the payee, or the assignee of any bankrupt payee.

XXVII. That when a dividend has been or may be declared under any fiat, the commissioner acting in the prosecution of such fiat may, by order under his hand, testified by a deputy-registrar, in the form specified in the schedule hereunto annexed (No. 14), direct the sum ordered to be divided, or such part thereof as may be required, to be carried from the general account of such estate to an account to be kept in the books of the accountant in bankruptcy, entitled "The Dividend Account," and to the particular estate; provided that when it shall appear that any part of the money directed to be applied in payment of any dividend is not called for to make such payment, the commissioner may, by order under his hand, testified as aforesaid, and in the forms specified in the schedule hereunto annexed (Nos. 15, 16, 17, 18, and 19, as the case may be), direct such sum to be carried back to the original account of the estate to which it belonged.

XXVIII. That all dividend warrants under any bankrupt's estate, which shall have been delivered to any official assignee by the accountant in bankruptcy for more than twelve calendar months, the same having been previously stamped by such accountant, but which shall not have been delivered to any creditor of such estate, shall forthwith, after the expiration of such twelve months, be brought or sent by such official assignee, together with two lists thereof, under each bankrupt's estate, to the said accountant, who shall thereupon compare the warrants with such lists, and cancel such warrants; and one

of such lists shall be certified by the said accountant, and returned to the official assignee, who shall file such list with the proceedings of the respective bankruptcies ; and the other of such lists to be retained by the said accountant ; and the payment of the dividend to any such creditor to be made in manner to be hereafter ordered by the Lord Chancellor.

XXIX. That the official assignee shall, once in every quarter of a year, deliver to the Court to which he shall be attached an account made up to the last day of the preceding month, together with his cash-book and banker's pass-book, duly balanced, and any other books that the commissioner may require ; and such account shall show the balances placed to the credit of the accountant in bankruptcy, and of every estate under the charge of such official assignee in the books kept in the office of the accountant in bankruptcy, such balances to be certified by the said accountant ; and such account shall also show the balances of every bankrupt's estate then in the hands or under the power or control of the official assignee.

XXX. That such quarterly account shall be kept by the deputy-registrar of the Court to which such official assignee shall be attached, and shall be open to the inspection of creditors ; and that notice shall be given in each Court of such account having been delivered, and that any creditor applying to the Court may inspect the same, without fee, at such convenient time as may be appointed by the Court.

XXXI. That all monies, bills of exchange, notes, and other negotiable instruments hereinbefore directed to be paid or delivered to or by the Bank of England, may be paid or delivered to or by the Bank of England by or through any of the branch banks thereof, or any other bank that may be named by the Governor and Company of the Bank of England for that purpose ; and all business arising in the country with the Bank of England may, where necessary or convenient, be transacted with the Bank of England by or through any of such branch banks, or other bank so named.

XXXII. That the several forms specified in the schedule hereunto annexed for the several purposes therein stated, and not hereinbefore referred to, be followed in all cases where the same may be applicable.

XXXIII. That if the official assignee shall keep under his

control more than £100 of money belonging to any one estate, or more than £1000 in the aggregate of monies belonging to bankrupts' estates, for more than one week, he shall be charged in his accounts by the commissioner with such sum as shall be equal to interest at the rate of £20 per cent. on the excess of the said sum of £100 or £1000, as the case may be, for such time as such money shall be under his control beyond the said week : and, unless the money has been kept from proper causes, the official assignee shall be dismissed from his office, upon the report of the commissioner, or upon petition to the Lord Chancellor by the creditors' assignee or assignees, or by any creditor, and be liable to the costs and expenses, and have no claim to remuneration.

XXXIV. That, subject to the provisions of this order, the official assignee shall follow the directions of the commissioner under whom he shall act.

XXXV. That all forms relating to the payment or delivery into or out of the Bank of England of any money, bills, notes, or other securities under commissions and fiats in bankruptcy, prosecuted in the country, be printed in red ink.

XXXVI. That printed copies of this order, and of the rules herein referred to, shall be supplied by the Lord Chancellor's Secretary of Bankrupts to the several courts authorized to act in the prosecution of fiats in bankruptcy in London, and in the several districts in the country, and also to the accountant in bankruptcy, the Governor and Company of the Bank of England, and the Chief Registrar of the Court of Bankruptcy, and each official assignee ; and that one such copy of this order be posted up in some conspicuous place in every such court, and in the respective offices of the accountant in bankruptcy, chief registrar, and official assignees.

LYNDHURST C.

SCHEDULE.

No. 1.

Form of Letter to Bankrupt forthwith after Appointment of Official Assignee.

Sir,

[Residence and date].

HAVING been appointed official assignee to your estate, I have to inform you that the Court requires you to make out and deliver to me immediately—

1st. A list of all your creditors (alphabetically arranged) and of liabilities on bills of exchange, as acceptor, drawer, or indorser, and any other engagement proveable under your estate. [*If any creditor has received your acceptance, or note of hand, or any other bill, with your name as drawer or indorser, or any other security, goods, or property, on account of his debt, state the particulars against his name.—This list is required within a week from this day.*]

2ndly. A list of all the debtors to your estate. [*State the name and present residence of the debtor, and the sum due, distinguishing those you consider to be bad or doubtful, or that are disputed.—If the debtor has been bankrupt, state if the debt has been proved, and if any, and what dividends have been received by you.—If you hold or have received any security from the debtor, state its nature.*]

3rdly. A statement of rent, taxes, and rates due by you up to the quarter-day preceding your bankruptcy, with an account of all sums due for salaries and wages, and the rate per year, month, or week.

4thly. A statement of the probable value of your stock in trade, leasehold property in houses, lands, or buildings, or any other property in your possession or control, or in the possession of others, on which you have received any advances, or have an interest. [*State if the stock and premises are insured from fire, in what office, to what extent, and when the insurance expires, and who holds the policy.*]

You will also inform me, if there are in your custody, or in the custody of any other person, any books, papers, or

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documents belonging to your estate, not already taken by the messenger; and the Court requires that you attend from day to day at my office, to make up and balance your books, and prepare a balance-sheet for the purpose of passing your last examination, and which must be filed at least ten days before the day appointed for the last examination, being the — day of —. I remain, Sir, your obedient servant,

To Mr. — — Official Assignee.

No. 2.

Direction from Official Assignee for Payment of Sums exceeding 500l. in amount due to a Bankrupt's Estate into the Bank.

By virtue of an order of the Lord Chancellor, bearing date the — day of —, I hereby direct you to pay the sum of — due [or by the books and statements of the bankrupt hereinafter named appearing to be due] from you to the estate of C. D., of —, a bankrupt, into the Bank of England, to the credit of the accountant in bankruptcy for the said estate.

At the time of payment you will have a receipt from the bank, which will be a sufficient discharge to you for the same.—I am, &c.

To — — Official Assignee.

N. B.—It is of great importance that you should produce this letter to the bank, or fill up the annexed form, when you make the payment.

No. 3.

Certificate of Payment into Bank by other than Official Assignees.

Bankrupts' Estates.

— day of —, 184 .

Estate of —

I hereby certify, that A. B. — of — has this day paid into the Bank of England the sum of —, to be placed to the credit of Basil Montagu, Esq., as the accountant in bankruptcy for the above estate.

£—.

For the Governor and Company
of the Bank of England.

Entered —.

— Cashier.

N. B.—This certificate to be retained by party making payment in.

No. 4.

Certificate of Payment into Bank by Official Assignee.

Bankrupts' Estates.

— day of —, 184 .

I hereby certify that Mr. *E. F.*, official assignee of the estate of — bankrupt, has this day paid into the Bank of England the sum of —, to be placed to the credit of Basil Montagu, Esq., as the accountant in bankruptcy.

£ —.

For the Governor and Company
of the Bank of England.

Entered —.

— Cashier.

N. B.—This certificate to be sent forthwith to accountant in bankruptcy by the official assignee, upon payment being made into bank.

No. 5.

Order for Payment of Money.

BANK.

In the Court of Bankruptcy.

Basinghall-street, London, — day of —.

Before Mr. Commissioner —.

In the matter of —.

It appearing to me, by the annexed certificate, that the sum of — stands to the credit of the above estate, I HEREBY CERTIFY that the sum of — is required for the —; I therefore order the said sum to be paid to — out of the monies standing to the credit of the accountant in bankruptcy in the books of the Bank of England.

I certify that by my books the sum of £— stands to the credit of the above estate in the books of the accountant in bankruptcy.

—Official Assignee.

— Commissioner.

Estate of —.

— Dep. Reg.

Pursuant to the above order, pay to the said — the said sum of —, to be charged to the debit of my account as accountant in bankruptcy.

£ —.

— Accountant.

To the Cashiers of the Bank of England.

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No. 6.

Order for Purchase of Exchequer Bills.

In the Court of Bankruptcy.

Basinghall-street, London, — day of —.

Before Mr. Commissioner —.

In the matter of —.

It appearing to me, by the annexed certificate, that the sum of — stands to the credit of the above estate, I ORDER the sum of — to be laid out in the purchase of Exchequer bills, and that the Exchequer bills, when purchased, be deposited in the Bank of England to the credit of the Accountant in bankruptcy; provided that no sum be paid for such purchase, until the Exchequer bills be deposited in the Bank of England.

I certify that by my books the sum of £ — stands to the credit of the above estate in the books of the accountant in bankruptcy.

— Official Assignee.

— Commissioner.

— Dep. Reg.

Estate of —.

Pursuant to the above order, pay to — the sum of —, on his causing £ — Exchequer bills so purchased to be deposited in the bank to the credit of my account as Accountant in bankruptcy.

£ —.

— Accountant.

To the Cashiers of the Bank of England.

No. 7.

Order for Sale of Exchequer Bills.

In the Court of Bankruptcy.

Basinghall-street, London, — day of —.

Before Mr. Commissioner —.

In the matter of —.

It appearing to me, by the annexed certificate, that the following Exchequer bills stand to the credit of the above estate, viz. —, I ORDER that — of such Exchequer bills be forthwith sold, and for that purpose that such Exchequer bills be delivered out to one of the cashiers of the bank, who is to receive the money arising by such sale,

I certify that by my books the within-mentioned Exchequer bills stand to the credit of the above estate in the books of the accountant in bankruptcy.

— Official Assignee.

APPENDIX.

and pay the same into the Bank of England to the credit of the Accountant in bankruptcy; provided that such Exchequer bills be not delivered by the cashier of the bank, until the proceeds of the sale be paid into the bank as aforesaid.

— Commissioner.

— Dep. Reg.

Estate of —.

Pursuant to the above order, deliver out of the Bank of England to one of the cashiers of the bank the following Exchequer bills, viz. —, for the purpose of being sold; provided that such Exchequer bill be not delivered by the cashier of the bank, until the proceeds of the sale be paid into the bank as aforesaid.

£ —.

— Accountant.

To the Cashiers of the Bank of England.

No. 8.

Order for Sale of Stock.

In the Court of Bankruptcy.

Basinghall-street, London, — day of —.

Before Mr. Commissioner —.

In the matter of —.

I certify that by my books the sum of £— stock stands to the credit of the above estate in the books of the Accountant in bankruptcy.

— Official Assignee.

It appearing to me, by the annexed certificate, that the sum of — stands to the credit of the above estate, I THEREFORE ORDER the said sum of — to be forthwith sold; provided that such stock be not transferred by the Accountant in bankruptcy, until the proceeds of the sale be paid into the Bank of England to the credit of the said Accountant.

— Commissioner.

— Dep. Reg.

To the Cashiers of the Bank of England.

No. 9.

Notice by Official Assignee to Creditor, when Dividend is payable.

— District, — day of —.

Estate of —.

Sir,

I have to inform you that you may, upon application at my office on any day after the — day of —, between the

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hours of —, receive a warrant for the dividend due to you on the above estate.

If you cannot personally attend, the warrant will be delivered to your order, upon your filling up and signing the subjoined letter.

The bills and securities (if any) exhibited at the time of the proof of your debt must be produced to me, before the warrant for the dividend can be received. I am, Sir, your obedient

— Official Assignee.

— Residence.

— day of —.

Estate of —.

Sir,

Please deliver to — the dividend warrant payable to me under the above estate.

To — Official Assignee.

— Creditor.

No. 10.

List of Proofs of Debts and Claims for Dividend.—No. 2.

FORM OF LIST.

In the Court of Bankruptcy,

Basinghall Street, London, — 184—.

In the matter of — bankrupt.

A LIST OF DEBTS proved and claimed under the —, with the — dividend at the rate of — in the pound, this day declared thereon by Mr. Commissioner —.

| No. | Creditors.
<i>To be placed alphabetically, and the Names of all the Parties to the Proof to be carefully set forth.</i> | Sum proved.
<i>The Claims to be set forth in the same manner at the End of the whole of the Proofs.</i> | Dividend. |
|-----|--|--|-----------|
| | | | |

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No. 14.

Order of Transfer to Dividend Account.

In the Court of Bankruptcy.

Basinghall Street, London, — day of —, 184 .

Before Mr. Commissioner —.

In the matter of —

By the annexed certificate it appears that the sum of £ — stands to the credit of the above estate; and by an order made in this bankruptcy on the — day of —, a dividend amounting to £ — was ordered to be paid to the creditors: I therefore order the sum of £ — to be carried to the "Dividend Account" of the above estate.

I certify that by my books the sum of £ — stands to the credit of the above estate in the books the accountant in bankruptcy.

—Official Assignee.

— Commissioner.

— Dep. Reg.

£ — carried over, — day of —.

Entered —.

No. 15.

Proof reduced.

In the Court of Bankruptcy.

— day of —, 184 .

Before Mr. Commissioner —.

In the matter of —.

I have altered the proof of — from £ — to £ —, and hereby direct a warrant to be drawn for the dividend of — in the pound, corresponding with such alteration, and amounting to the sum of £ —; and I further direct a new warrant to be made out for the balance £ —, to be carried back to the original account of the above estate, in the books of the accountant in bankruptcy.

£ — To be signed.

£ — To be carried to the "Original Account."

£ — Dividend on original proof.

— Commissioner.

£ — carried back, — day of —.

Entered —

N. B.—Old Warrant to be produced to Accountant in Bankruptcy, and cancelled by him, before new warrant be stamped and signed by him.

| | | | |
|---|---|---|------------|
| <p><i>Margins of Book.</i></p> <p>No. of Warrant. _____</p> <p>Estate of _____</p> <p>Dividend of _____ in the £.</p> <p>Creditor _____</p> <p>Recd. Warrant _____ day of _____</p> <p>_____ Creditor.</p> <p>_____ Day of _____.</p> | <p>Accountant's</p> <p style="text-align: center;">£ —</p> <div style="border: 1px solid black; width: 50px; height: 50px; margin: 0 auto;"></div> <p>Stamp.</p> <p>_____ Dividend of _____ in the £.</p> <p>_____ declared _____ day of _____ 184—.</p> <p>A. B. is entitled to be paid the sum of _____.</p> <p>To the Accountant in Bankruptcy. _____ Official Assignee.</p> | <p>No. 13.—<i>Country Dividend Warrant.</i></p> <p>_____ District, _____ day of _____.</p> <p>Estate of _____, Bankrupt.</p> <p>(Under Fiat or Commission dated _____.)</p> | <p>No.</p> |
|---|---|---|------------|

Order for Payment. { Let this be paid to A. B., or Bearer, from my account as Accountant in Bankruptcy. _____

£ —

To the Cashiers of the Bank of England.

N.B.—If the sum to be paid on the above warrant be under the sum of ten pounds, the same may be received at any branch of the Bank of England, without the signature of the Accountant, if presented within one calendar month of the date of the warrant. —

This, upon being endorsed by the Payee, will be paid any day between the hours of eleven and three at the office of the Accountant in Bankruptcy, at the Court of Bankruptcy, Basinghall Street, London, or at any branch of the Bank of England.

Observe Rules, *infra*, as to Endorsement.

RULES AS TO ENDORSEMENT OF WARRANT.

That the endorsement by an executor or administrator of any creditor be sufficient. That if any other person than the creditor, or person duly authorised by the creditor, applies to receive the dividend, the person so applying for the same must obtain an order for payment thereof, upon the warrant, by a commissioner under his hand; and if any dividend warrant be above twelve months date, a like order for payment thereof by a commissioner shall be required: provided always that in no case shall any such dividend be paid to an official assignee, unless such official assignee be the payee, or the administrator or executor of the payee, or the assignee of any bankrupt payee.

ORDER,—OFFICIAL ASSIGNEES.

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No. 14.

Order of Transfer to Dividend Account.

In the Court of Bankruptcy.

Basinghall Street, London, — day of —, 184 .

Before Mr. Commissioner —.

In the matter of —

By the annexed certificate it appears that the sum of £ — stands to the credit of the above estate; and by an order made in this bankruptcy on the — day of —, a dividend amounting to £ — was ordered to be paid to the creditors: I therefore order the sum of £ — to be carried to the "Dividend Account" of the above estate.

I certify that by my books the sum of £ — stands to the credit of the above estate in the books the accountant in bankruptcy.

—Official Assignee.

— Commissioner.

— Dep. Reg.

£ — carried over, — day of —.

Entered —.

No. 15.

Proof reduced.

In the Court of Bankruptcy.

— day of —, 184 .

Before Mr. Commissioner —.

In the matter of —.

I have altered the proof of — from £ — to £ —, and hereby direct a warrant to be drawn for the dividend of — in the pound, corresponding with such alteration, and amounting to the sum of £ —; and I further direct a new warrant to be made out for the balance £ —, to be carried back to the original account of the above estate, in the books of the accountant in bankruptcy.

£ — To be signed.

£ — To be carried to the "Original Account."

£ — Dividend on original proof.

— Commissioner.

£ — carried back, — day of —.

Entered —

N. B.—Old Warrant to be produced to Accountant in Bankruptcy, and cancelled by him, before new warrant be stamped and signed by him.

APPENDIX.

No. 16.

Proof expunged.

In the Court of Bankruptcy.

— day of —, 184—.

Before Mr. Commissioner —.

In the matter of —.

I have expunged the proof of —, and I order that a new warrant be made out for the dividend thereon, amounting to £ —, to be carried back to the original account of the above estate, in the books of the Accountant in bankruptcy.

— Commissioner.

£ — carried back, day of —.

Entered —.

N.B.—Old Warrant to be produced to Accountant in Bankruptcy and cancelled by him.

No. 17.

Claim established.

In the Court of Bankruptcy.

— day of —, 184—.

Before Mr. Commissioner —.

In the matter of —.

— having established his claim of £ —, I hereby direct a warrant to be drawn for the dividend of — in the pound thereon, amounting to the sum of £ —.

— Commissioner.

£ —.

Signed — day of —.

Entered —.

No. 18.

Claim in part established.

In the Court of Bankruptcy.

— day of —.

Before Mr. Commissioner —.

— having in part established his claim of £ — to the extent of —, I HEREBY DIRECT a warrant to be drawn for —, being the dividend on the sum of £ —.

And I FURTHER DIRECT a warrant for the residue of the dividend reserved on the said claim of £ —, amounting to £ —, to be drawn, and the sum carried to the original ac-

ORDER,—OFFICIAL ASSIGNEES.

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count of the above estate in the books of the Accountant in Bankruptcy.

£—— To be signed.

£—— To be carried to "Original Account."

£—— Originally reserved, being the dividend at the rate of
—— in the pound on £——.

—— Commissioner.

£—— carried back, —— day of ——.

Entered ——.

No. 19.

Claim expunged.

In the Court of Bankruptcy.

—— day of ——, 184—.

Before Mr. Commissioner ——.

In the matter of ——.

I HAVE expunged the claim of —— for £——, and hereby direct a warrant to be drawn for the dividend of —— in the pound thereon, amounting to the sum of £——, to be carried back to the original account of the above estate in the books of the Accountant in Bankruptcy.

——, Commissioner.

£——, carried back, —— day of ——.

Entered ——.

No. 20.

Form of Payment into Bank by the Lord Chancellor's Secretary of Bankrupts to "The Secretary of Bankrupts' Account."

£10 Fee on granting Fiat.

—— day of ——, 184—.

I do hereby certify, that ——, the Lord Chancellor's Secretary of Bankrupts, has paid into the Bank of England the sum of —— to the credit of the account of Basil Montagu, Esq., as Accountant in Bankruptcy, entitled "The Secretary of Bankrupts' Account."

£——.

For the Governor and Company
of the Bank of England.

Entered ——.

——, Cashier.

N.B.—This certificate to be sent to Accountant in Bankruptcy forthwith, upon payment into Bank.

APPENDIX.

No. 21.

Form of Payment into Bank by Deputy Registrar to "The Secretary of Bankrupts' Account."

£3 Fee for every sitting under old Commissions.

London, — day of —, 18—.

I do hereby certify, that the assignees of the under-mentioned estates have paid into the Bank of England, by the hands of —, one of the deputy registrars of the Court of Bankruptcy, the following sums, viz.

The assignee of the estate of —, £—

" "

" "

" "

—
£—.

amounting to — pounds; which money is placed to the credit of Basil Montagu, Esq., as Accountant in Bankruptcy, in "The Secretary of Bankrupts' Account."

£—.

For the Governor and Company
of the Bank of England.

Entered —.

—, Cashier.

This certificate to be sent forthwith to Accountant in Bankruptcy, upon payment being made into Bank.

No. 22.

Form of Payment into Bank by Official Assignees to "The Secretary of Bankrupts' Account."

£20 Fee out out of First Monies received by him.

London, — day of —, 18—.

I do hereby certify, that Mr. (E. F.), official assignee of the estate of —, bankrupt, has this day paid into the Bank of England the sum of £—, to be placed to the credit of Basil Montagu, Esq., as the Accountant in Bankruptcy, and to the credit of "The Secretary of Bankrupts' Account."

£—.

For the Governor and Company
of the Bank of England.

Entered —.

—, Cashier.

N.B.—This certificate to be sent forthwith to the Accountant in Bankruptcy, upon payment being made into Bank.

ORDER,—OFFICIAL ASSIGNEES.

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No. 23.

Form of Payment into Bank by Official Assignees to "The Secretary of Bankrupts' Compensation Account."

£10 Fee, when a sufficient sum comes to his hands.

London, — day of —, 18—.

I do hereby certify, that Mr. (E. F.), official assignee of the estate of —, bankrupt, has this day paid into the Bank of England the sum of £—, to be placed to the credit of Basil Montagu, Esq., as the Accountant in bankruptcy, and to the credit of "The Secretary of Bankrupts' Compensation Account."

£ —.

For the Governor and Company
of the Bank of England.

Entered —.

—, Cashier.

N. B.—This certificate to be sent forthwith to the Accountant in Bankruptcy, upon payment being made into Bank.

No. 23.

Form of Payment into Bank by Official Assignees to "The Secretary of Bankrupts' Compensation Account."

£1 Fee for every meeting under fiat.

London, —, 18—.

I do hereby certify, that Mr. (E. F.), official assignee of the estate of —, bankrupt, has this day paid into the Bank of England the sum of £—, to be placed to the credit of Basil Montagu, Esq., as the Accountant in bankruptcy, and to the credit of "The Secretary of Bankrupts' Compensation Account."

£ —.

For the Governor and Company
of the Bank of England.

Entered —.

—, Cashier.

N. B.—This certificate to be sent forthwith to Accountant in Bankruptcy, upon payment being made into Bank.

No. 22.

Form of Payment into Bank by Official Assignees to "The Secretary of Bankrupts' Compensation Account."

Per-centage Fee on dividend.

London, — 18—.

I do hereby certify, that Mr. (E. F.), official assignee of the estate of —, bankrupt, has this day paid into the

No. 11.
List of Proofs of Debts and Claims, for Dividend.—No. 1.

In the Court of Bankruptcy, at Basinghall Street.

In the matter of —, bankrupt.
— 184—.

A List of Debts proved and claimed under this Fiat, with the — Dividend at the Rate of — in the Pound, this day declared thereon by Mr. Commissioner —.

Note.—*The Dividends will be paid from this List: it is therefore required to be carefully extracted from the Proceedings; signed by the Solicitor to the Fiat, and delivered to the Official Assignee the same day, or at the furthest the following day.*

| Creditors.
<i>To be placed alphabetically, and the Names of all the Parties to the Proof to be carefully set forth.</i> | Residence and Description. | Sums proved or claimed.
<i>Claims to be set forth in the same manner after the whole of the Proof.</i> | Dividend. | Bills and Securities exhibited. | | | | |
|--|----------------------------|---|-----------|---------------------------------|---------|-----------|-----------|------|
| | | | | Date of Bill or Note. | Drawer. | Acceptor. | Indorser. | Sum. |
| 0
N | | | | | | | | |

Margm of Book.

No. of Warrant.

Estate —

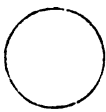
— Dividend of — in the £.

Creditor — A. B.

Recd. Warrant — day of —

— Creditor.

Accountant's £ —



Estate of —, Bankrupt.

(Under Fiat or Commission, dated —.)

— Dividend of — in the £ —,

declared — day of — 184—.

A. B. of — is entitled to be paid the sum of —.

Stamp.

To the Accountant in Bankruptcy.

— Official Assignee.

Order for Payment. { Let this be paid to A. B., or Bearer, from my Account as Accountant in Bankruptcy.

£ —

To the Cashiers of the Bank of England.

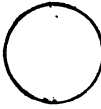
N.B.—This, upon being indorsed by the Payee, will be paid any day between the hours of Eleven and Three, at the Office of the Accountant in Bankruptcy, at the Court of Bankruptcy, Basinghall Street.

Observe Rules, *infra*, as to Endorsement.

RULES AS TO ENDORSEMENT OF WARRANT.

That the endorsement by an executor or administrator of any creditor be sufficient.

That if any other person than the creditor, or person duly authorized by the creditor, applies to receive the dividend, the person so applying for the same must obtain an order for payment thereof, upon the warrant, by a commissioner under his hand; and if any dividend warrant be above twelve months' date, a like order for payment thereof by a commissioner shall be required: provided always, that in no case shall any such dividend be paid to an official assignee, unless such official assignee be the payee, or the executor or administrator of the payee, or the assignee of any bankrupt payee.

| | | | | |
|-------------------------------|-------|--|--|-----|
| <i>Margins of Book.</i> | | <i>No. 13.—Country Dividend Warrant.</i> | | No. |
| No. of Warrant. | _____ | £— | _____ District, — day of —. | |
| Estate of _____. | |  | Estate of —, Bankrupt. | |
| Dividend of _____ in the £. | | | (Under Fiat or Commission dated —.) | |
| Creditor _____. | | Stamp. | Dividend of _____ in the £. | |
| Recd. Warrant _____ day of —. | | | declared _____ day of — 184—. | |
| _____ Creditor. | | | A. B. is entitled to be paid the sum of —. | |
| _____ Day of —. | | | _____ Official Assignee. | |
| | | To the Accountant in Bankruptcy. | | |
| | | Order for Payment. { Let this be paid to A. B., or Bearer, from my account as Accountant
in Bankruptcy. | | |
| | | £ — Accountant. | | |

To the Cashiers of the Bank of England.
 N.B.—If the sum to be paid on the above warrant be under the sum of ten pounds, the same may be received at any branch of the Bank of England, without the signature of the Accountant, if presented within one calendar month of the date of the warrant. —
 This, upon being endorsed by the Payee, will be paid any day between the hours of eleven and three at the office of the Accountant in Bankruptcy, at the Court of Bankruptcy, Basinghall Street, London, or at any branch of the Bank of England.
 Observe Rules, *infra*, as to Endorsement.

RULES AS TO ENDORSEMENT OF WARRANT.

That the endorsement by an executor or administrator of any creditor be sufficient.
 That if any other person than the creditor, or person duly authorised by the creditor, applies to receive the dividend, the person so applying for the same must obtain an order for payment thereof, upon the warrant, by a commissioner under his hand; and if any dividend warrant be above twelve months date, a like order for payment thereof by a commissioner shall be required: provided always that in no case shall any such dividend be paid to an official assignee, unless such official assignee be the payee, or the administrator or executor of the payee, or the assignee of any bankrupt payee.

ORDER,—OFFICIAL ASSIGNEES.

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No. 14.

Order of Transfer to Dividend Account.

In the Court of Bankruptcy.

Basinghall Street, London, — day of —, 184 .

Before Mr. Commissioner —.

In the matter of —

By the annexed certificate it appears that
the sum of £ — stands to the credit of

the above estate; and by an order made

in this bankruptcy on the — day of —,

a dividend amounting to £ — was ordered

to be paid to the creditors: I therefore order

the sum of £ — to be carried to the

“Dividend Account” of the above estate.

— Commissioner.

— Dep. Reg.

£ — carried over, — day of —.

Entered —.

No. 15.

Proof reduced.

In the Court of Bankruptcy.

— day of —, 184 .

Before Mr. Commissioner —.

In the matter of —.

I have altered the proof of — from £ — to £ —,
and hereby direct a warrant to be drawn for the dividend
of — in the pound, corresponding with such alteration,
and amounting to the sum of £ —; and I further direct
a new warrant to be made out for the balance £ —, to be
carried back to the original account of the above estate, in
the books of the accountant in bankruptcy.

£ — To be signed.

£ — To be carried to the “Original Account.”

£ — Dividend on original proof.

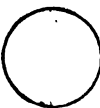
— Commissioner.

£ — carried back, — day of —.

Entered —

N. B.—Old Warrant to be produced to Accountant in
Bankruptcy, and cancelled by him, before new warrant be
stamped and signed by him.

| | | | | |
|--------------------------|-----|--|----------------------|-------------|
| <i>Margins of Book.</i> | | <i>No. 13.—Country Dividend Warrant.</i> | | No. |
| No. of Warrant. | £ — | Estate of —, Bankrupt. | | — day of —. |
| Dividend of — in the £. | | (Under Fiat or Commission dated —.) | | |
| Creditor — | | Dividend of — in the £. | | |
| Recd. Warrant — day of — | | declared — day of — 184—. | | |
| — Creditor. | | A. B. is entitled to be paid the sum of —. | | |
| — Day of —. | | To the Accountant in Bankruptcy. | — Official Assignee. | |

Accountant's  *Stamp.*

Order for Payment. { Let this be paid to A. B., or Bearer, from my account as Accountant in Bankruptcy. £ — — Accountant.

To the Cashiers of the Bank of England.
N.B.—If the sum to be paid on the above warrant be under the sum of ten pounds, the same may be received at any branch of the Bank of England, without the signature of the Accountant, if presented within one calendar month of the date of the warrant.—
This, upon being endorsed by the Payee, will be paid any day between the hours of eleven and three at the office of the Accountant in Bankruptcy, at the Court of Bankruptcy, Basinghall Street, London, or at any branch of the Bank of England.

Observe Rules, *infra*, as to Endorsement.

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That the endorsement by an executor or administrator of any creditor be sufficient. That if any other person than the creditor, or person duly authorised by the creditor, applies to receive the dividend, the person so applying for the same must obtain an order for payment thereof, upon the warrant, by a commissioner under his hand; and if any dividend warrant be above twelve months date, a like order for payment thereof by a commissioner shall be required: provided always that in no case shall any such dividend be paid to an official assignee, unless such official assignee be the payee, or the administrator or executor of the payee, or the assignee of any bankrupt payee.

ORDER,—OFFICIAL ASSIGNEES.

lxxxvii

No. 14.

Order of Transfer to Dividend Account.

In the Court of Bankruptcy.

Basinghall Street, London, — day of —, 184 .

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In the matter of —

By the annexed certificate it appears that the sum of £ — stands to the credit of the above estate; and by an order made in this bankruptcy on the — day of —, a dividend amounting to £ — was ordered to be paid to the creditors: I therefore order the sum of £ — to be carried to the "Dividend Account" of the above estate.

I certify that by my books the sum of £ — stands to the credit of the above estate in the books the accountant in bankruptcy.

—Official Assignee.

— Commissioner.

— Dep. Reg.

£ — carried over, — day of —.

Entered —.

No. 15.

Proof reduced.

In the Court of Bankruptcy.

— day of —, 184 .

Before Mr. Commissioner —.

In the matter of —.

I have altered the proof of — from £ — to £ —, and hereby direct a warrant to be drawn for the dividend of — in the pound, corresponding with such alteration, and amounting to the sum of £ —; and I further direct a new warrant to be made out for the balance £ —, to be carried back to the original account of the above estate, in the books of the accountant in bankruptcy.

£ — To be signed.

£ — To be carried to the "Original Account."

£ — Dividend on original proof.

— Commissioner.

£ — carried back, — day of —.

Entered —

N. B.—Old Warrant to be produced to Accountant in Bankruptcy, and cancelled by him, before new warrant be stamped and signed by him.

ruptcy there-
upon to grant a
protection.

Estate and
effects shall
forthwith be
vested in the
official assignee.

Not to prevent
insolvent from
being arrested
under a judge's
order.

Rotation of
commissioners,
and orders re-
lating to the
hearing of
petitions.

Commissioner
to examine the
petitioner, &c.
on oath.

order of the Court, as herein-after provided, the same shall be referred, or for the commissioner in the country to whom the petition shall be presented, to give, upon the filing of such petition, a protection to the petitioner from all process whatever, either against his person or his property of every description, which protection shall continue in force, and all process be stayed, until the appearance of the petitioner in Court, as herein-after provided; and upon the presentation of any such petition all the estate and effects of the petitioner shall forthwith become vested in the official assignee who shall be nominated by the commissioner acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed, without suit; and the said official assignee shall hold and stand possessed of the same, in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts.

2. Provided always, and be it enacted, That nothing herein contained shall be held or construed to hinder or prevent the said insolvent from being arrested or held to bail under the authority of any judge's order for that purpose, in like manner as may now by law be done, notwithstanding any protection which may be granted under the authority of this act.

3. And be it further enacted, That the Court of Bankruptcy shall appoint a certain rotation in which the commissioners thereof shall hear the matter of such petitions, and shall make from time to time orders touching such rotation, and touching the reference of such petitions, and also touching the commissioner to whom the matter of any petition shall be transferred in case of death, resignation, or removal, and also such orders as they may think right touching the notice of meetings and examinations to be given to creditors, and the publication of such notice; provided that such orders shall be approved of by the Lord Chancellor, lord keeper, or lords commissioners of the great seal for the time being.

4. And be it enacted, That the commissioner so authorized, or the commissioner in the country, (as the case may be,) shall, on the day notified by such notice as aforesaid, proceed to examine upon oath the petitioner, and any creditor who

may attend such examination, and any witness whom the petitioner or any creditor may call; and the said commissioner may adjourn the examination from time to time, and summon to be examined before him any debtor of such petitioner, or any creditor of such petitioner, or any other person whose evidence may appear necessary for the purposes of the inquiry; and if it shall appear to the said commissioner that the allegations in the petition and the matters in the schedule are true, and that the debts of the petitioner were not contracted by any manner of fraud or breach of trust, or any prosecution against the petitioner whereby he had been convicted of any offence, or without having at the time of becoming indebted reasonable assurance of being able to pay the debts, and that such debts were not contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat of bankruptcy, or malicious trespass, and that the petitioner made a full discovery of his estate, effects, debts and credits, and has not parted with any of his property since the presenting of his petition, it shall then be lawful for the said commissioner to cause notice to be given that on a certain day, to be named therein, he will proceed to make an order, unless cause be shown to the contrary; which order shall be called a final order, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the majority in number and value of the creditors who may attend before the commissioner on such day, or for the carrying into effect such proposal as the petitioner shall have set forth in his petition; provided that the consideration of such final order may be adjourned from time to time by the commissioner, without any fresh notice: Provided always, that it shall be lawful for the said commissioner, if he shall think fit, to direct in such final order some allowance to be made for the support of the petitioner out of his estate and effects.

Adjournment of examination.

If commissioner satisfied with allegations of the petitioner, he may make a final order for his protection, &c.

Allowance for support.

5. And be it enacted, That at the first examination of the petitioner it shall be lawful for the commissioner to renew the order for protection, and to renew it from time to time until the final order for protection or distribution.

Renewal of order for protection.

Punishment for
prevarication,
&c.

Power of com-
mitment.

On passing of
final order,
estate of peti-
tioner to be
vested in his
assignees.

Provision for
death or re-
moval of
assignees.

Certificate of
appointment of
assignees to be
registered,
where required.

1 & 2 Will. 4,
c. 56.

6. And be it enacted, That it shall be lawful for the commissioner, by warrant under his hand and seal, to commit to prison any petitioner who shall appear to him to have prevaricated or made any false statement before him, for such time as he shall think fit, not exceeding one calendar month; and touching all persons other than the petitioner who shall be examined before him, or being lawfully summoned shall refuse or neglect to attend him, the said commissioner shall have the same power in respect of commitment, as he has by any law now in force relating to bankrupts.

7. And be it enacted, That from and after the passing of the final order, the whole estate, present and future, as well real as personal, and as well in the colonies, dominions, and plantations belonging to her Majesty, as in the united kingdom of Great Britain and Ireland, all the effects and all the credits of the petitioner, shall become absolutely vested in the official assignee and assignee chosen by the creditors, without any deed or conveyance, which assignees shall hold the same as fully as if the petitioner had been made a bankrupt and they had been assignees under his fiat, and shall sue and be sued as if they had been assignees under such fiat; and as often as any such assignees shall die or be lawfully removed, and a new assignee duly appointed, all estate, real and personal, and such effects and credits, as were or remained vested in such deceased or removed assignee, shall vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed or conveyance for that purpose.

8. Provided always, and be it enacted, That where, according to any laws now in force, any conveyance or assignment of any real or personal property of a petitioner would require to be registered, enrolled, or recorded in any registry office in England, Wales, or Ireland, or in any registry office, court, or other place in Scotland, or any of the dominions, plantations, or colonies belonging to her Majesty, then in every such case such certificate of the appointment of an assignee or assignees as is described in an act passed in the first and second year of the reign of his late majesty King William the Fourth, intituled "An Act to establish a Court in Bankruptcy," shall be registered in the registry office, court, or place wherein such conveyance or assignment as last aforesaid would require to be registered, enrolled, or recorded;

and the registry hereby directed shall have the like effect, to all intents and purposes, as the registry, enrolment, or recording of such conveyance or assignment as last aforesaid would have had; and the title of any purchaser of any such property as last aforesaid for valuable consideration, who shall have duly registered, enrolled, or recorded his purchase deed previous to the registry hereby directed, shall not be invalidated by reason of such appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within the times following; (that is to say,) as regards the united kingdom of Great Britain and Ireland, within two months from the date of such appointment, and as regards all other places, within twelve months from the date thereof.

Title of purchasers not to be invalidated by the appointment of an assignee.

9. And be it enacted, That the said assignees shall be entitled to claim and demand from the said petitioner, at any time after the said final order, any estate and effects acquired by him at any time after such order shall have been made; and all such estate and effects, of what kind soever and wheresoever situate, shall be absolutely vested in such assignees upon their filing a copy of their claim, served upon the petitioner personally, or by leaving it at the place of residence mentioned in his notice of petition, and they shall hold the same in like manner as they held the estate and effects of the petitioner transferred by force of the final order, as hereinbefore provided: Provided always, that no assignee of any insolvent shall be authorized by virtue of this Act to take possession of any estate or effects which the insolvent shall have acquired or become possessed of after the making of the final order herein mentioned, except under the authority of an order of the said commissioner, or of the Court of Review in Bankruptcy, made for that purpose, and then only to the extent and at the time and in manner directed by such order, and after giving such notices, and doing such acts, matters, and things, as by the rules, orders, and regulations made under the authority of this Act shall be required and directed in that behalf.

Estate of petitioner to be absolutely vested in his assignees.

Assignee not to take possession of estate, &c. without an order for the purpose.

10. Provided always, and it is hereby further enacted, That if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the

Proof of presentation of petition and making of final order to bar suits.

said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence.

Proof of appointment of assignees.

11. And be it enacted, That the like evidence of the appointments of assignees shall be received as sufficient to prove such appointments in all courts and places whatsoever, as is received by the laws now in force relating to bankrupts to prove such appointments.

Creditor or official assignee may make motion for rescinding final order in part.

12. And be it enacted, That it shall be lawful for any creditor, or official assignee or other assignee, at any time after the final order shall have been made, to give one month's notice to the petitioner, either by personal service, or, if he cannot be found, by service at the place of his residence mentioned in his notice of petition, that such creditor intends to apply by motion to the said commissioner, or, in case of his death, resignation, or removal, to the commissioner appointed to succeed him, that the final order be rescinded as far as relates to the protection of the petitioner's person from process, and as far as relates to the effect of such order in bar of suits and actions; and the said commissioner shall, upon hearing the matter of such motion, and any evidence in support of it, and what the petitioner has to allege against it, and any evidence against it, and upon examining the petitioner, if he shall desire to be examined or if the commissioner shall think fit, proceed to make such rescinding order as is hereinbefore mentioned, if he sees reason to believe that the petitioner had not before the making of the order sought to be rescinded made a full disclosure of his estate, effects, and debts, or had since the making of such order not given notice to the assignees of any property after acquired by him; provided that on any such motion by a creditor the official and other assignee shall be duly served with a month's notice to attend the said commissioner; and provided further, that notice of the hearing of such motion shall be given twice in the London Gazette and twice in the same paper in which notice of the petition had been given, or in some other paper circulating in the same county; and provided always, that the said commissioner, in case he shall refuse to make the rescinding order, shall, if he think fit, order the petitioner's

Commissioner to hear motion.

Notice of motion.

Costs of motion.

costs of the motion to be paid by the creditor making the motion, or by the assignee chosen by the creditors, in case he shall make the motion, but not out of the petitioner's estate and effects.

13. And be it enacted, That it shall be lawful for the judges and commissioners of the Court of Bankruptcy, or any four of them, to make such orders, rules, and regulations as they shall think fit for the better carrying this Act into execution, and particularly for regulating and appointing the duties of the official assignees and of the other assignees, the auditing their accounts, the collecting the debts and the realizing the estate and effects of the petitioner, and the notification of the time of hearing petitions or motions in the Gazette or otherwise; which orders, rules, and regulations shall, upon being approved by the Lord Chancellor, lord keeper or lords commissioners of the great seal, be laid before both houses of parliament within fourteen days from such approval, if parliament be then sitting, or if not, within fourteen days from the commencement of the next session of parliament, and shall in the meantime and from the date of such approval be binding upon the commissioners in the country, and upon all other persons whatever, until such time as either house of parliament shall make some resolution in whole or in part disapproving the same.

Judges and commissioners may make orders for carrying Act into execution.

Orders to be approved by the Lord Chancellor, and laid before parliament.

14. And be it enacted, That this Act shall not come into operation before the first day of November next ensuing, except as regards the power of the commissioners to make orders, rules, and regulations, with consent of the Lord Chancellor, lord keeper, or lords commissioners of the great seal.

Time when Act shall come into operation.

15. Provided always, and be it enacted, That this Act may be altered or repealed by any Act to be passed during the present session of parliament.

Act may be altered, &c. this session.

SCHEDULE.

I. A. B., at present and for months past residing at
in the parish of and county of and being
[here set forth the description of the debtor, and his profession]

or calling, if any], do hereby give notice, that I intend to present a petition to the Court of Bankruptcy [*or "the commissioner of the district," as the case may be*], praying to be examined touching my debts, estate, and effects, and to be protected from all process, upon making a full disclosure and surrender of such estate and effects for payment of my just and lawful debts; and I hereby further give notice, that the time when the matter of the said petition shall be heard is to be advertised in the London Gazette and in the newspaper one month at the least after the date hereof. As witness my hand, this day of in the year .

*RULES AND ORDERS made under the Statute
5th and 6th Victoria, c. 116, intituled " An Act for the
Relief of Insolvent Debtors."—Nov. 1, 1842.*

IT IS ORDERED.—I. That every petition for protection from process under the statute passed in the parliament holden in the 5th and 6th years of the reign of her present Majesty, intituled " An Act for the Relief of Insolvent Debtors," shall be taken to the chief registrar of the Court of Bankruptcy in Basinghall street, or to the deputy registrar of the District Court of Bankruptcy in the country (as the case may be in London or in the country), between the hours of 11 in the forenoon and 2 in the afternoon, who shall file and number such petition; and such chief or deputy registrar shall thereupon allot such petition by ballot, or in rotation, to one of the commissioners in London, or of the district court in the country (where there are two commissioners), and shall forthwith certify to such commissioner the filing of such petition, and such allotment to him, which certificate shall be filed with the proceedings in the matter of such petition; and such petition shall be prosecuted before such commissioner, or before the district commissioner, where there is only one commissioner; provided always that any one commissioner in London or in the country may, in the absence of any other commissioner, act for him.

II. That every such petition shall be, as far as the case will admit, in the form set forth in the schedule marked (A, No. 1) annexed to these Orders.

III. That the schedule required by the said act to be annexed to such petition shall be annexed at the time of filing such petition, and shall be, *mutatis mutandis*, in the forms now in use in the court for the relief of insolvent debtors.

IV. That each sheet of such petition and schedule shall be signed by the petitioner, in the presence of, and shall be attested by, his attorney.

V. That every petitioner shall immediately after an official

assignee shall have been nominated, in pursuance of the provisions of the said act, deliver over to such official assignee all monies, bills, notes, and securities, and other personal estate of such petitioner in his possession or power, together with all books of account, papers, and writings relating to his estate and effects.

VI. That the protection from process to be given to any petitioner upon filing his petition shall be called the "Interim Order for Protection," and shall be in the form set forth in the schedule marked (A, No. 2), annexed to these orders.

VII. That the time for hearing the matter of such petition shall be appointed by the commissioner acting in the same, such time not to be less than five, nor exceeding eight weeks from the date of the advertisement of the intention to petition required by the aforesaid statute; and such commissioner shall cause it to be advertised in the form set forth in the schedule marked (B, No. 1), annexed to these orders in the London Gazette, and in one newspaper circulating within the county in which the petitioner resides, three clear days at least before the day appointed for such sitting.

VIII. That the time for making a final order, unless cause be shown to the contrary, in the matter of such petition, shall be appointed by the commissioner acting in the same, of which time the commissioner shall cause notice to be given ten days at least before the time appointed; which notice shall be by advertisement, in the form set forth in the schedule marked (B, No. 2), annexed to these orders.

IX. That the final order shall be in the form set forth in the schedule marked (A, No. 3), annexed to these orders, and shall be made in duplicate, one copy to be filed with the proceedings, and one copy to be delivered to the petitioner.

X. That all bills of fees and disbursements of any attorney, or messenger, for business done under the aforesaid act, shall be taxed by the Court in which the petition shall have been filed.

XI. That until further order the mode of taking possession of the estate and effects of such petitioner, the mode of realizing the same, and of depositing the produce thereof, together with the mode of keeping and examining the accounts of the official and other assignees, and all forms of proceedings under the said act not herein specially provided for, be

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mutatis mutandis, in conformity with the like forms and proceedings in bankruptcy.

| | | |
|--------------------|---|----------------|
| JOHN CROSS, Judge. | } | Commissioners. |
| C. F. WILLIAMS. | | |
| J. H. MERIVALE. | | |
| JOSHUA EVANS. | | |
| EDWARD HOLROYD. | | |

Approved,
LYNDHURST, Chancellor.

The following are the forms referred to in the above "Orders":—

Petition for Protection under 5 and 6 Victoria, c. 116.

(A, No. 1.)

To the Court of Bankruptcy, [or "to the ——— District Court of Bankruptcy."] ———

The humble Petition of ——— of ——— in the ——— of ———

[Insert at full length, the name, address, description, and quality of the petitioner.]

Sheweth,—That your petitioner is not a trader within the meaning of the statutes now in force relating to bankrupts.

[If a trader, strike out the word "not," and add after the word "bankrupts" the words "but owing debts amounting in the whole to less than £300.]

That your petitioner has resided 12 months within the district of this honourable court—that is to say,

[Insert the places and periods of residence.]

That your petitioner has become indebted, without any fraud, or gross or culpable negligence, to divers creditors, whose names are inserted in the schedule marked ——— to this his petition annexed.

That your petitioner has given notice to one-fourth in number and value of such creditors (that is to say, to the several creditors to whose names the word "notice" is annexed in the said schedule) of his intention to present this petition, and has caused notice thereof to be inserted twice in the London Gazette—that is to say, ——— on the ——— day of ———, and ——— the ——— day of ——— last; and twice in the ——— newspaper—that is to say, on ——— the ——— day of ———, and ——— the ——— day of ——— last, as by the said Gazette and newspaper will appear.

That the schedules marked respectively — to this petition annexed, contain a full and true account of your petitioner's debts, with the names of his creditors, and the dates of contracting the debts severally, the nature of the debt and the security (if any) given for the same; and also of the nature and amount of his property, and of the debts owing to him, with their dates and the names of his debtors, and the nature of the securities (if any) which he has for such debts.

That your petitioner, being unable to pay and satisfy such debts, is desirous that his estates should be administered under the protection and direction of this honourable Court; for the more readily effecting which, your petitioner submits to this honourable Court the proposal contained in the schedule marked — to this petition annexed.

[Strike out these words from the words "for the more" to the words "petition annexed," when there is no special proposal.]

That your petitioner is ready and willing to be examined from time to time touching his estate and effects, and to make a full and true disclosure and discovery of the same.

Your petitioner, therefore, prays that your petitioner may be protected from all process whatever, either against his person or his property of every description; and that your petitioner may have such further and other relief as by the statute made in the Parliament holden in the 5th and 6th years of the reign of her present Majesty, intituled "An Act for the Relief of Insolvent Debtors," is provided, and this honourable Court shall think fit.

And your petitioner shall ever pray, &c.

Signed by the said petitioner on
the — day of — 184—, in the
presence of — of — in the —
of —, his attorney in the matter
of the said petition.

Interim Order for Protection from Process.

(A, No. 2.)

At the Court of Bankruptcy, Basinghall Street, London, [or
"At the — District Court of Bankruptcy, held at
—"] the — day of — 184—.

In the matter of the petition of — of — in the —
of — an insolvent debtor.

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Be it remembered, that the abovenamed ——— having presented a petition to this honourable Court, under the provision of an act of Parliament, passed in the 5th and 6th years of the reign of her present Majesty, intituled “An Act for the Relief of Insolvent Debtors,” and such petition having been this day filed in Court, a protection is hereby given to the said ——— from all process whatsoever (except as hereinafter mentioned) either against his person or his property of every description; which protection shall continue in force, and all process (except process for arresting or holding him to bail under the authority of a judge’s order for that purpose) be stayed, until the ——— day of ——— at ——— o’clock in the ———, being the time appointed for the appearance of the said ——— at the Court of Bankruptcy, Basinghall Street, London, [or “at the ——— District Court of Bankruptcy, at ———”] and for the first examination of the said ———, according to the form of the said act.

Commissioner.

Final Order for Protection from Process.

(A, No. 3.)

At the Court of Bankruptcy, Basinghall Street, London, [or
“At the ——— District Court of Bankruptcy, held at
——,”] ——— the ——— day of ———, 184—.

In the matter of the petition of ——— of ——— in the ———
of ——— an Insolvent Debtor.

Be it remembered, that the said ——— having presented his petition to this honourable Court, under the provisions of an act of Parliament, passed in the 5th and 6th years of the reign of her present Majesty, intituled “An Act for the Relief of Insolvent Debtors;” and such petition having been duly filed in Court, and the said petitioner having duly appeared and been examined, tendering his debts, estate, and effects; and it appearing to the undersigned commissioner, upon the examination of the said petitioner upon oath, at the time and place abovementioned, that the allegations in the said petition, and the matters in the schedule thereunto annexed, are true, and that the debts of the said petitioner were not contracted by any manner of fraud, or breach of trust, or any prosecution against the petitioner, whereby he was convicted of any offence, or without having, at the time of becoming indebted, reasonable assurance of being able to pay the debts,

and that such debts were not contracted by reason of any judgment in breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat in bankruptcy, or malicious trespass; and that the petitioner has made a full discovery of his estate, effects, debts, and credits, and has not parted with any of his property since the presenting of his petition; a final order is hereby made for the protection of the person of the said petitioner from all process, and for the vesting of his estate and effects in — the official assignee, named by the undersigned commissioner for that purpose, together with — the assignee (or assignees), this day here chosen by the majority in number and value of the creditors attending before the undersigned commissioner.

And for carrying into effect, in the following manner, the proposal of the petitioner, for the payment of his debts, that is to say

[If any special order is made as to the retention of tools of trade, bedding, wearing apparel, or other matters, insert it here, or on the back of the sheet.]

And it is hereby ordered that £ — be allowed for the support of the said petitioner, out of his estate and effects.

Commissioner.

Examination on Final Order, under 5 & 6 Vict. c. 116.

In the Court of Bankruptcy, Basinghall-street, London, [or
“ In the District Court of Bankruptcy, held at —,”] the
— day of — 184—.

In the matter of — an insolvent debtor.

Memorandum.—That the said — having presented his petition to this honourable Court, under the provisions of an act of parliament passed in the parliament holden in the 5th and 6th years of the reign of her present Majesty, intituled “ An Act for the Relief of Insolvent Debtors,” and such petition having been duly filed in Court, and the said petitioner being come before me — Esq., a Commissioner of the Court of Bankruptcy, in order to make a full and true discovery and disclosure of his estate and effects, pursuant to notice in the London Gazette for that purpose given, and being sworn and examined at the time and place above men-

tioned, upon h— oath saith, that the several allegations in the petition above named, and the several matters in the schedules thereunto annexed, are true, and that the debts of this deponent were not contracted by any manner of fraud or breach of trust, or by reason of any prosecution against this deponent, whereby h— was convicted of any offence, or without having, at the time of becoming indebted, reasonable assurance of being able to pay such debts, and that such debts were not contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat in bankruptcy, or malicious trespass, and that this deponent has in h— said schedules, made a full discovery of all h— estate, effects, debts, and credits, and has not parted with any of h— property since presenting of h— petition.

(B, No. 1.)

Advertisement of filing Petition, and day for hearing, and first Examination of Petitioning Debtor, under 5 & 6 Vict. c. 116.

Whereas a petition of — in the county of — having been filed in the Court of Bankruptcy [or “in the — District Court of Bankruptcy”], and the *interim* order for protection from process having been given to the said —, under the provisions of an act of parliament passed in the parliament holden in the 5th and 6th years of the reign of her present Majesty, intituled “An Act for the Relief of Insolvent Debtors,” the said — is hereby required to appear in court before —, the commissioner acting in the matter of the said petition, on the — day of — next, at — o’clock in the — noon precisely, at the Court of Bankruptcy, Basinghall-street, London [or “at the District Court of Bankruptcy, in —,”] for the purpose of being then and there examined touching his debts, estate, and effects, and to be further dealt with according to the provisions of the said act.

All persons indebted to the said —, or that have any of his effects, are not to pay or deliver the same but to —

APPENDIX.

the official assignee, nominated in that behalf by the commissioner acting in the matter of the said petition.

(B, No. 2.)

Advertisement of Day fixed for the sitting of the Court for making Final Order, under the 5 & 6 Vict. c. 116.

In the matter of the petition of ——— of ———.

Notice is hereby given, that ———, the commissioner acting in the matter of this petition, will proceed to make a final order thereon at the Court of Bankruptcy, Basinghall-street, London [or "at the ——— District Court of Bankruptcy, at ——— in ———,"] on ——— the ——— day of ——— at ——— o'clock in the ——— noon precisely, unless cause be then and there shown to the contrary.

Appointment of Official Assignee.

In the Court of Bankruptcy, Basinghall-street, London,
[or "At ——— District Court of Bankruptcy."]
——— day of ———, 184—.

In the matter of ——— insolvent.

I hereby nominate and appoint ———, official assignee, to be an assignee, together with the assignee or assignees to be chosen by the creditors of the said insolvent.

Commissioner.

Deputy Registrar.

Schedule of Petitioning Debtor, under 5 & 6 Vict. c. 116.

In the Court of Bankruptcy, [or "In the District Court of Bankruptcy."]

The schedule of ———.

I, the said ——— do declare that this my schedule doth contain a full and fair description of me, as to my name or names, trade or trades, profession or professions, together with my last usual place of abode, and the place or places where I have resided during the time when my debts were contracted, and also a full and true description of all debts due or growing due from me at the time of presenting my

petition, and of all and every person and persons to whom I am indebted, or who to my knowledge or belief claim to be my creditors, together with the nature and amount of such debts and claims respectively, and the dates of contracting the debts severally, and the security given for the same, distinguishing such as are admitted from such as are disputed by me, and also a full, true, and perfect account of all my estate and effects, real and personal, in possession, reversion, remainder or expectancy, and also of all places of benefit or advantage held by me, whether the emoluments of the same arise from fixed salaries, or from fees or otherwise, and also of all pensions or allowances which I have in possession or reversion, or which are held by any other person or persons for me, or on my behalf, or of and from which I derive or may derive any manner of benefit or advantage, and also of all rights and powers of any nature and kind whatsoever, which I am, or any other person or persons in trust for me, or for my use, benefit or advantage, are in any manner whatsoever seised or possessed of, or interested in or entitled unto, or which I, or any other person or persons in trust for me, or for my benefit, have any power to dispose of, charge, or exercise for my benefit or advantage, together with a full, true and perfect account of all the debts due or growing due, at the time of making the said order, to me, or to any person or persons in trust for me, or for my benefit or advantage, either solely or jointly with any other person or persons, with their dates, and the names and places of abode of the several persons from whom such debts are due or growing due, and of the witnesses who can prove such debts, so far as I can set forth the same, and the nature of the security which I have for any such debts; and that this my schedule doth also contain a balance-sheet of so much of my receipts and expenditures, and of the items composing the same, as is required by this honourable Court in that behalf; and doth fully and truly describe the wearing apparel, bedding, and other such necessities of myself and my family, and my working tools and implements.

Witness my hand, the — day of — One thousand eight hundred and forty —.

Signed in the presence of

Attorney.

Balance Sheet of Receipts and Expenditure.

The Court requires

That this account shall in no case begin later than six calendar months before the presenting of the petition.

That, if before that period, but since the commencement of his present embarrassments, any property has gone away from him by sale, assignment, mortgage, distress, execution, or any means other than the ordinary course of trade, the account shall commence so as to include all such transactions.

† That the blanks in the description of the debtor side of the account shall be filled with a date early enough for compliance with the above directions.

That the specific appropriation of each sum received shall be separately shown, where the case admits of it.

That the date of each item in the account shall be given by stating the day as well as the year, where the same can be ascertained.

That money and other property, which was in possession of the insolvent or his family, or of any other person for his or their benefit, at the time when he presented his petition, shall, in all cases, be made a specific item or items in the account.

| Dr. | | Cr. | |
|---|---------|---|---------|
| † Specification of all property, real and personal, in which I have had an interest at any time since the ——— day of ——— 184—, to the time of subscribing this my schedule, showing when, how, to whom, and for what consideration any portion of any such property has been parted with. | | Account of all such property, showing what part thereof is now available for the benefit of my creditors, and, as to such part as has been parted with, the particular application of the proceeds of the same. | |
| Date. | £ s. d. | Date. | £ s. d. |
| | | | |

ORDERS.—INSOLVENTS.

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CREDITORS.

N.B.—Where there are cross demands, the party must be entered both as creditor and debtor, and “set off” must be written under the amount.

| No. | Names and Descriptions of Creditors and Claimants, and their present or last residences. | Amount. | | | When contracted. | Admitted or disputed. | Nature and Consideration of the Debt and Securities, if any; also, if the Debt is disputed, the reason thereof. |
|-----|--|---------|----|----|------------------|-----------------------|---|
| | | £ | s. | d. | | | |
| | | | | | | | |

☞ Affix the word “notice” to the names of all creditors to whom you have given notice of your intention to petition.

DEBTORS.

N.B.—Where there are cross demands, the party must be entered both as creditor and debtor, and “set off” must be written under the amount.

| No. | Names, Descriptions, and Places of Abode of Debtors. | Amount. | | | When contracted. | Good, Bad, or Doubtful. | Nature and consideration of the Debt; also Securities, if any for the same. | Witnesses, with their Residences, and other Evidence by which the Debt may be proved. |
|-----|--|---------|----|----|------------------|-------------------------|---|---|
| | | £ | s. | d. | | | | |
| | | | | | | | | |

Property in Possession.

Real and personal estates and effects, which were in my possession, enjoyment, or control, or which were held by any other person or persons in trust for my use, or to the possession or enjoyment of which I was entitled at the time of subscribing my petition.

Supposed Value.

1. *Interests in Land.*

£ s. d.

Freehold, copyhold, and leasehold property, with local description, names of tenants, and annual rent of the same; and statement of encumbrances (if any) thereupon, with the dates thereof.

*(Property in Possession—continued.)**2. Personal Property.*

£ s. d.

Household goods and furniture, at
 Wearing apparel
 Jewels, trinkets, and ornaments for the person
 Plate, linen, and china
 Wines and other liquors
 Books, prints, and pictures
 Horses, cows, and other animals
 Carriages
 Farming stock and implements of husbandry
 Stock in trade in my business of
 Machinery and utensils in my business of
 Ships and shares of ships—viz.
 Cash, bills, promissory notes, bonds, and
 other personal property not before specified.

3. Property in the Funds, Annuities, Shares, &c.

Annuities, money in the public or other
 funds, shares in canal and other companies;
 showing in whose names the same
 are standing, also when, and by whom the
 last dividend or other payment was received
 in respect of the same.

4. Unpaid Legacies.

Legacies due, but unpaid, with all particulars
 concerning the same.

☞ Where under any division the petitioner has no property, the word
 "none" to be entered.

Books, Deeds, Papers.

The following is a true list of all books, papers, deeds,
 and writings, relating to my estate and effects, or any
 part thereof, which at the time of presenting my petition
 were, or at any time since have been in my
 possession, or under my custody or control, or in
 the possession or custody of any person in trust for
 me, or for my use, benefit, or advantage:—

Property in Reversion, &c.—Places, Pensions, Rights and Powers.

[N.B. Contingent as well as vested interests must be entered.]

Real and personal estates and effects, in which I have any interest in reversion, remainder, or expectancy.

*Supposed value of
my interest if now
to be sold.*

1. *Interest in Land.*

£ s. d.

Freehold, copyhold, and leasehold property, with names and descriptions of persons now enjoying the same, and the annual value thereof; also the nature of my interest therein, and from whom, and in what manner, it is derived.

2. *Personal property.*

Personal property, with names and descriptions of persons now enjoying the same; also the nature of my interest therein, and from whom, and in what manner it is derived.

3. *Property in the funds, annuities, shares, &c.*

Annuities, money in the public or other funds, shares in canal and other companies, showing in whose names the same are standing, with names and descriptions of persons now enjoying the same; also the nature of my interest therein, and from whom, and in what manner, it is derived.

Places and Pensions in Possession or Reversion.

Places of benefit or advantage held by me, with the salaries, fees, and emoluments thereof; also all pensions and allowances in possession or reversion held by me, or by any other person or persons for me, or on my behalf, or of and from which I derive, or may derive, any benefit or advantage.

| | | |
|---|----|----|
| £ | s. | d. |
| | | |

Rights and Powers.

Rights and powers, which I, or any other person or persons in trust for me, or for my use, benefit, or advantage, am or are in any manner seised or possessed of, or interested in, or entitled unto, or which I, or any other person or persons in trust for me, or for my benefit, have any power to dispose of, charge, or exercise for my benefit or advantage.

| £ | s. | d. |
|---|----|----|
| | | |

RULES AND ORDERS.

IN BANKRUPTCY, }
COURT OF REVIEW. }

Monday, the 29th of April, 1844.

The Right Honourable Sir JAMES LEWIS KNIGHT BRUCE,
Chief Judge of the Court of Bankruptcy, and Sir
GEORGE ROSE, Judge of the Court of Bankruptcy, in
pursuance of an Act of Parliament made and passed
in the 1st and 2nd Year of her Majesty, and intituled
“ An Act for abolishing Arrest on Mesne Process in
“ Civil Actions, except in certain Cases, and for extend-
“ ing the Remedies of Creditors against the Property
“ of Debtors, and for amending the Laws for the
“ Relief of Insolvent Debtors in England,” do hereby
order and direct in manner following, that is to say:—

I. THAT every person, to whom, in any matter pending, or that shall be pending, in the Court of Review, any sum of money or costs has or have been or shall be ordered to be paid, shall, after the lapse of one month from the time when such Order for payment was duly passed, be entitled by his solicitor to sue out of the Court of Bankruptcy one or more Writ or Writs of Fieri Facias, or Writ or Writs of Elegit, of the form hereinafter stated, or as near thereto as the circumstances of the case will allow or may require.

Writs of Fieri Facias and Elegit may issue to compel payment of money and costs.

II. That, upon every such Order already passed or hereafter to be passed, the Registrar, or Deputy Registrar of the Court of Bankruptcy acting as Registrar to the Court of Review, shall, on request, mark the day of the month and year on which the same was or shall have been so passed; and no Writ of Fieri Facias or Elegit shall be sued out upon any such Order, unless such date shall be so marked thereon as aforesaid.

Time of passing to be marked on Order for payment of money or costs.

III. That such writs when sealed shall be delivered to the sheriff, or other officer, to whom the execution of the like

Mode of execution of such writs.

Writs issuing out of her Majesty's Court of Common Pleas at Westminster belongs, and shall be executed by such sheriff, or other officer, as nearly as may be in the same manner in which he doth or ought to execute such like writs; and such writs, when returned by such sheriff or other officer, shall be delivered to the said Registrar or Deputy Registrar, or be left at his office, and shall thereupon be filed as of record in the Court of Bankruptcy; and that for the execution of such writs such sheriff, or other officer, shall not take or be allowed any fee or fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the said Court of Common Pleas.

Writs to be filed.
Fee for execution.

Writ of Venditioni Exponas.

IV. That if it shall appear upon the return of any such Writ of Fieri Facias as aforesaid, that the sheriff, or other officer, hath by virtue of such writ seized, but not sold, any goods of the person ordered to pay such sum of money or costs as aforesaid, the person to whom such sum of money or costs shall be payable shall, immediately after such writ, with such return, shall have been filed as of record, be at liberty by his solicitor to sue out of the Court of Bankruptcy a Writ of Venditioni Exponas in the form hereinafter stated, or as near thereto as the circumstances of the cases will allow or may require.

Requisite indorsements on Writs of Fieri Facias and Elegit.

V. That on every such Writ of Fieri Facias and Elegit so to be issued as aforesaid, there shall be written the words "By the Court;" and there shall be indorsed thereon the description and place of residence of the party against whom such writ shall be issued, and also the name and the residence or place of business of the solicitor at whose instance the same shall be issued, and that every such writ be also indorsed for the sum to be levied, according to the form used upon like writs issuing out of the said Court of Common Pleas.

FORMS OF WRITS.

No. I.

Writ of Fieri Facias on an Order of the Court of Review for Payment of Money.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting: We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ which lately before us, in our Court of Review, in a certain matter

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there depending, intituled "In the matter of E. F. a bankrupt," by an Order of our said Court, bearing date the day of was ordered to be paid by the said C. D. to A. B., and that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said sum of £ at the rate of 4l. per centum per annum, from the day of (a): And that you have that money and interest before us in our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said Order: And that you do all such things as, by the statute passed in the second year of our reign, you are authorised and required to do in this behalf: And in what manner you shall have executed this our Writ make appear to us in our said Court immediately after the execution thereof, and have there then this Writ.

Witness Ourself at Westminster, the day of in the year of our reign.

No. II.

Writ of Fieri Facias on an Order of the Court of Review for Payment of Money, and Interest.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting: We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made the sum of , and also interest thereon at the rate of £4 per centum per annum, from the day of (b), which said sum of money and interest were lately, before us in our Court of Review, in a certain matter there depending, intituled "In the matter of E. F. a Bankrupt," by an Order of our said Court, bearing date the day of , ordered to be paid by the said C. D. to A. B.: And that you have that money and interest before us in our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said Order: And that you do all such things as, by the statute passed in the second year of our reign, you are authorised and required to do in this behalf: And in what manner you shall have executed this our Writ make appear to us in our said Court immediately after the execution thereof, and have there then this Writ.

Witness, &c.

No. III.

Writ of Fieri Facias on an Order of the Court of Review for Payment of Money, and Costs.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting: We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made the sum of , which said sum of money was lately, before us in our Court of Review, in a certain matter there depending, intituled "In the matter of E. F.

(a) The day on which the Order was made, or if that were prior to the 1st of October 1838, say "from the 1st day of October 1838."

(b) The day mentioned in the order.

a bankrupt," by an Order of our said Court, bearing date the day of , ordered to be paid by the said C. D. to A. B., together with certain costs in the said Order mentioned, and which costs have been taxed and allowed [by G. H. Esquire, one of the Deputy Registrars of the Court of Bankruptcy](a) at the sum of , as appears by the certificate of the said [Deputy Registrar](a) dated the day of : And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of (b) together with interest at the rate of £4 per centum per annum on the said sum of (c) from the day of (d), and on the said sum of (b) from the day of (e): And that you have that money and interest before us in our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said Order, and that you do all such things as, by the statute passed in the second year of our reign, you are authorised and required to do in this behalf: And in what manner you shall have executed this our Writ make appear to us in our said Court immediately after the execution thereof, and have there then this Writ.

Witness, &c.

No. IV.

Writ of Fieri Facias on an Order of the Court of Review for Payment of Money, Interest, and Costs.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting: We command you, that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of , and also interest thereon at the rate of £4 per centum per annum from the day of (f), which said sum of money and interest were lately before us in our Court of Review, in a certain matter there depending, intituled "In the matter of E. F. a bankrupt," by an Order of our said Court bearing date the day of , ordered to be paid by the said C. D. to A. B. together with certain costs in the said Order mentioned, and which costs have been taxed and allowed by [G. H. Esquire, one of the Deputy Registrars of the Court of Bankruptcy], at the sum of as appears by the certificate of the said [Deputy Registrar](a) dated the day of : And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of together with interest thereon at the rate aforesaid from the day of (g): And that you have that money and interest before us in our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said Order: And that you do all things as, by the statute passed in the second year of our reign, you are autho-

(a) Or as the fact may be, depending on whom the costs were taxed by.

(b) The costs. (c) The money.

(d) The date of the Order, or if that were prior to the 1st October 1838, say "from the 1st day of October 1838."

(e) The date of the certificate, or if that were prior to the 1st of October 1838, say, "from the 1st day of October 1838."

(f) The day mentioned in the Order.

(g) The date of the certificate of taxation, or, if that were prior to the 1st October 1838, say, "from the 1st day of October 1838."

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ried and required to do in this behalf: And in what manner you shall have executed this our Writ make appear to us in our said Court immediately after the execution thereof, and have there then this Writ.

Witness, &c.

No. V.

Writ of Fieri Facias on an Order of the Court of Review for Payment of Costs.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting: We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of , for certain costs which were lately, before us in our Court of Review, "In the matter of E. F. a bankrupt," by an Order of our said Court, bearing date the day of , ordered to be paid by the said C. D. to A. B., and which costs have been taxed and allowed by [G. H. Esquire, one of the Deputy Registrars of the Court of Bankruptcy](a) at the sum of as appears by the certificate of the said [Deputy Registrar](a) dated the day of : And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest on the said sum of , at the rate of £4 per centum per annum, from the day of (b): And that you have that money and interest before us in our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said Order: And that you do all such things as, by the statute passed in the second year of our reign, you are authorised and required to do in this behalf: And in what manner you shall have executed this our Writ make appear to us in our said Court immediately after the execution thereof, and have there then this Writ.

Witness, &c.

No. VI.

Writ of Elegit on an Order of the Court of Review for Payment of Money, or Money and Interest.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting: whereas lately in our Court of Review, in a certain matter there depending, intituled "In the matter of E. F. a bankrupt," by an Order of our said Court made in the said matter, and bearing date the day of , it was ordered that C. D. should pay unto A. B. the sum of £ [if interest be given by the Order say, "together with interest thereon after the rate of £4 per centum per annum, from the day of "]: And afterwards the said A. B. came into our said Court of Review, and, according to the form of the statute in such case made and provided, chose to be delivered to him, ["her," or "them," as the case may be], all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough,

(a) Or as the fact may be, depending on whom the costs were taxed by.

(b) The date of the certificate of taxation, or, if that were prior to the 1st October 1838, say, "from the 1st day of October 1838."

and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the day of (a), in the year of our Lord , or at any time afterwards, or over which the said C. D. on the said day of (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ , together with interest thereon, at the rate of £4 per centum per annum from the said day of (b), shall have been levied: Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any person in trust for him was seised or possessed of on the said day of (a), or at any time afterwards, or over which the said C. D. on the said day of (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our Writ make appear to us in our Court of Review aforesaid, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement; and have there then this Writ.

Witness Ourself at Westminster, &c.

No. VII.

Writ of Elegit on an Order of the Court of Review for Payment of Costs.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting: Whereas lately in our Court of Review, in a certain matter there depending, intituled "In the matter of E. F. a bankrupt," by an Order of our said Court made in the said matter, and bearing date the day of , it was ordered that C. D. should pay unto A. B. certain costs, as in the said Order mentioned, and which costs have been taxed and allowed by [G. H. Esquire, one of the Deputy Registrars of the Court of Bankruptcy] (c) at the sum of

(a) The day on which the Order was made.

(b) If the Order be for money and interest, the day mentioned in the Order; if for money only, the day on which the Order was made; or in case it was made prior to the 1st of October 1838, say "from the 1st day of October 1838."

(c) Or as the fact may be, depending on whom the costs were taxed by.

£ , as appears by the certificate of the said [Deputy Registrar] (a), dated the day of : And afterwards the said A. B. came into our said Court of Review, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any one in trust for him was seised or possessed of on the day of (b), in the year of our Lord , or at any time afterwards, or over which the said C. D. on the said day of (b), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ , together with interest thereon at the rate of £4 per centum per annum from the said day of (c), shall have been levied: Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands and tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any person or persons in trust for him was or were seised or possessed of on the said day of (b), or any time afterwards, or over which the said C. D. on the said day of (b), or at any time afterwards, had any disposing power which he might, without the assent of any other person or persons, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ , together with interest as aforesaid, shall have been levied: And in what manner you shall have executed this our Writ make appear to us in our Court of Review aforesaid, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement; and have then there this Writ.

Witness Ourself at Westminster, &c.

No. VIII.

Writ of Elegit on an Order of the Court of Review for Payment of Money, and Costs.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting: Whereas lately in our Court of Review, in a certain matter there depending, intituled "In the matter of E. F. a bankrupt,"

(a) Or as the fact may be, depending on whom the costs were taxed by.

(b) The date of the certificate of taxation.

(c) The date of the certificate of taxation, or if that were prior to the 1st of October 1838, say "from the 1st day of October 1838."

by an Order of our said Court made in the same matter, and bearing date the day of , it was ordered that C. D. should pay unto A. B. the sum of £ together with certain costs as in the said Order mentioned, and which costs have been taxed and allowed by [G. H. Esquire, one of the Depnty Registrars of the Court of Bankruptcy] (a) at the sum of £ as appears by the certificate of the said [Deputy Registrar] (a) dated the day of : And afterwards the said A. B. came into our said Court of Review, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any one in trust for him was seized or possessed of on the day of in the year of our Lord (b), or at any time afterwards, or over which the said C. D. on the said day of , or any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ together with interest upon the said sum of £ at the rate of £4 per centum per annum, from the day of (c), and on the said sum of £ at the rate aforesaid from the day of (d), shall have been levied: Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any person or persons in trust for him was or were seized or possessed of on the said day of (b), or at any time afterwards, or over which the said C. D. on the said day of (b), or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest aforesaid, shall have been levied: And in what manner you shall have executed this our Writ make appear to us in our Court of Review aforesaid, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement; and have there then this Writ.

Witness Ourself at Westminster, &c.

- (a) Or as the fact may be, depending on whom the costs were taxed by.
- (b) The day on which the Order was made.
- (c) The day on which the Order was made, or in case it was made prior to the 1st October 1838, say "from the 1st day of October 1838."
- (d) The date of the certificate of taxation, or if that were prior to the 1st day of October 1838, say, "from the 1st day of October 1838."

No. IX.

Writ of Elegit on an Order of the Court of Review for Payment of Money, Interest, and Costs.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of _____, greeting: Whereas lately in our Court of Review, in a certain matter there depending, intituled "In the matter of E. F. a bankrupt," by an Order of our said Court made in the said matter, and bearing date the _____ day of _____, it was ordered that C. D. should pay unto A. B. the sum of £ _____ together with interest thereon after the rate of £4 per centum per annum, from the day of _____, together also with certain costs as in the said Order mentioned, and which costs have been taxed and allowed by [G. H. Esquire, one of the Deputy Registrars of the Court of Bankruptcy] (a) at the sum of £ _____, as appears by the certificate of the said [Deputy Registrar] (a) dated the _____ day of _____: And afterwards the said A. B. came into our said Court of Review, and, according to the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the _____ day of _____ in the year of our Lord _____ (b), or at any time afterwards, or over which the said C. D. on the said _____ day of _____ (b), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ _____ and £ _____ together with interest upon the said sum of £ _____ at the rate of £4 per centum per annum, from the said _____ day of _____ (c), and on the said sum of £ _____ at the rate aforesaid, from the _____ day of _____ (d), shall have been levied: Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said _____ day of _____ (b), or at any time afterwards, or over which the said C. D. on the said _____ day of _____, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tene-

(a) Or as the fact may be, depending on whom the costs were taxed by.

(b) The day on which the Order was made.

(c) The day mentioned in the Order.

(d) The date of the certificate of taxation, or if that were prior to the 1st of October 1838, say "from the 1st day of October 1838."

ments, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest as aforesaid, shall have been levied: And in what manner you shall have executed this our Writ make appear to us in our Court of Review aforesaid immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement; and have there then this Writ.

Witness Ourself at Westminster, &c.

No. X.

Writ of Venditioni Exponas.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting: Whereas by our Writ we lately commanded you that of the goods and chattels of C. D. [*here recite the Fieri Facias to the end*], and on the day of you returned to us in our Court of Review aforesaid, that, by virtue of the said Writ to you directed, you had taken goods and chattels of the said C. D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers: Therefore we, being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you that you expose to sale, and sell, or cause to be sold, the goods and chattels of the said C. D. by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Review aforesaid immediately after the execution hereof, to be paid to the said A. B., and have there then this Writ.

Witness Ourself at Westminster, the day of in the year of our reign.

Approved,
LYNDHURST, C.

J. L. KNIGHT BRUCE, C. J.
G. ROSE.

STATUTES.

By the recent Act "to amend the Law of Insolvency, Bankruptcy and Execution," 7 & 8 Vict. c. 96, various alterations are made in the provisions of the 5 & 6 Vict. c. 116, for the relief of insolvent debtors.

By *section 57*, arrest upon final process is abolished in any action for the recovery of any debt, wherein the sum recovered shall not exceed 20*l.*, exclusive of the costs.

By *section 41*, the Lord Chancellor is empowered, upon petition made to him in writing by any trader, who shall have filed a declaration of insolvency in manner and form prescribed by the statute in that case made and provided relating to bankrupts, and upon payment of the like sum as is pay-

able upon the granting a fiat upon the petition of a creditor, to be carried to and to be applicable to the purposes of the account in the Bank of England, intituled "The Secretary of Bankrupts' Account," to issue a fiat in bankruptcy against such trader, and to authorise the prosecution thereof in the Court of Bankruptcy in London, or in any District Court of Bankruptcy; and it is declared that the Court, so authorised as aforesaid, upon the application of such trader, and upon proof of the trading and of the filing of such declaration, or upon the application of any creditor or creditors of such trader to such amount as by the said statute required for a petitioning creditor's debt, and upon proof of the matters requisite to support a fiat issued upon the petition of a creditor, may make the adjudication of bankruptcy under such fiat; and all further proceedings under such fiat are to be thenceforth prosecuted and carried on in like manner, as if such fiat had been issued and adjudicated upon on the petition of a creditor of the bankrupt.

By *section 42*, "the Lord Chancellor may from time to time attach the several Commissioners of the Court of Bankruptcy appointed to act in the country, to such districts described by her Majesty, with the advice of her Privy Council, as he shall think fit."

By *section 43*, "a minute of every petition filed by any trader under the provisions of the said recited act (the 5 & 6 Vict. c. 116), shall be transmitted to the Lord Chancellor's Secretary of Bankrupts, at such time and in such manner and form as the Lord Chancellor shall direct."

By *section 44*, reciting that "it may be expedient that the Courts of Bankruptcy should hold sittings in some matters of bankruptcy, or petitions for protection from process, at some place or places at which such courts have not hitherto been used to sit," it is enacted "that it shall be lawful for the Lord Chancellor, at any time or times whenever it shall appear to him under the circumstances of the case to be expedient, by any Order or Orders, to give the necessary directions in that behalf. And every Commissioner, and Deputy Registrar, acting under any such Order, shall have paid to him his travelling and other expenses, in the same manner and out of the same fund as travelling and other expenses are directed to be paid by the 5 & 6 Vict. c. 122, to any Commissioner or Deputy Registrar acting for, or in aid of, any Commissioner or Deputy Registrar in cases provided for by such act."

By *section 45*, the Lord Chancellor is empowered "to appoint some fit and proper person, such person being a barrister of not less than five years standing at the bar, or who shall have practised as a pleader for not less than five years, or who shall have held the office of Registrar or Deputy Registrar of the Court of Bankruptcy for not less than five years, or an admitted attorney of one of her Majesty's superior Courts at Westminster, or of her Majesty's Court of Bankruptcy, in actual practice, of not less than five years standing on the roll of such Court or Courts, to be the taxing officer of the Court of Bankruptcy, and to be called the Master of the said Court, at such salary not exceeding 1200*l.* per annum, as the Lord Chancellor shall think fit, and to be entitled to an annuity not exceeding two-thirds of such salary, if and when such officer shall be affected with some permanent infirmity disabling him from the due execution of his office, such salary or annuity, as the case may be, to be charged upon and paid (without any deduction except the tax on income) out of the same fund, and at the same times and in like manner, as the salaries or annuities of the Registrars and Deputy Registrars of the said Court." The Lord Chancellor may fill up any vacancy in the office. "And every such taxing officer shall hold his office during his good behaviour, and shall discharge his duties in person, except where otherwise provided by the act, or by any regulation to be made under the act, and may be removed from his office by the Lord Chancellor for misconduct." The business to be transacted by this officer is declared to be "the swearing of such affidavits as may be sworn before any Commissioner, Registrar, or Deputy Registrar of the Court of Bankruptcy, and the taxing of such costs taxable by any Court of Bankruptcy, by virtue of any statute now or hereafter to be in force, as the Lord Chancellor shall from time to time by any general or other Order direct, subject to review of the Court authorised to tax the same; and the place, time and manner, in which the same shall be conducted, shall be such as the Lord Chancellor shall by any such Order direct."

By *section 46*, upon the taxation of any bills, there shall be paid to the Master such sum as the said Master shall decide, not less than 1*s.*, nor more than 10*s.*, and also 4*d.* a folio, over and above the said sum of 10*s.*, for every folio exceeding twenty folios of such bill.

By *section 47*, all sums and fees received by the Master are

directed to be paid by him into the Bank of England, to the credit of the Accountant in Bankruptcy to the account intituled "The Secretary of Bankrupts' Account," after deducting such sum as the Lord Chancellor shall think fit for the expenses of the office.

By *section 48*, in case of sickness, or other unavoidable cause of absence for a longer period than two months at any one time, the Lord Chancellor may give leave of absence to the Master, by Order in writing, and, if necessary, appoint a deputy in his place during such time as expressed in the Order.

By *section 49*, the Registrars and Deputy Registrars are to be paid in future only by salary, and are given an increase of 200*l.* a year, in addition to the increase of 200*l.* a year given them by the 5 & 6 Vict. c. 122, making now the salaries of the two Chief Registrars 1200*l.* each, of the Deputy Registrars in London 1000*l.* each, and the Deputy Registrars in the country 800*l.* each.

By *section 50*, all fees received by the Chief Registrar are to be paid by him, as the Lord Chancellor shall by any Order direct, into the Bank of England, to the credit of the Accountant in Bankruptcy, to the account intituled "Interest arising from the Bankruptcy Fund Account," after deducting such sum as the Lord Chancellor shall think fit for stationery and other incidental expenses of the offices of the Chief Registrar and the Court of Review. The salaries to clerks, ushers, and other under officers of the Court of Bankruptcy, heretofore paid by the Chief Registrar out of such fees, are directed to be thenceforth paid by the Bank of England out of the fund standing to such account, under such Order as may be made by the Lord Chancellor. And, on or before the 1st March 1845, if parliament be then sitting, or if not, within fourteen days from the commencement of the then next session, there is to be laid before Parliament by the Chief Registrar a return made up to the 31st December then last, of the total amount of all fees received by him, and of the payment over to the Bank of England, such payment over to be certified by the Accountant in Bankruptcy, and a like return is to be made by him annually.

By *section 51*, the Lord Chancellor may, on a petition presented to him for that purpose, order an annuity or clear yearly sum to be paid to any of the Registrars, not exceeding two thirds of his yearly salary, if he shall be afflicted with

some permanent infirmity disabling him from the due execution of his office, and shall be desirous of resigning the same.

By *section 53*, "the Court authorised to act in the prosecution of any fiat in bankruptcy, or any petition for protection from process, shall have power, whenever it shall seem expedient to such Court, to direct a Deputy Registrar of such Court to act in the prosecution of such fiat or petition for proof of debts, and the examination of parties or witnesses on oath, or for either of such purposes, subject to such rules and regulations as the Lord Chancellor shall from time to time think fit to make in that behalf; the travelling expenses of such officer to be settled by such Court, and paid out of the estate of the bankrupt or petitioner as the case may be; and such officer so acting shall have and exercise the power vested in such Court for proof of debts and examination of parties or witnesses, except the power of commitment: Provided always, that all such examinations of parties or witnesses shall be taken down in writing, and shall be annexed to and form part of the proceedings under such fiat or petition, as the case may be."

By *section 54*, the Deputy Registrars are in future to be called Registrars.

By *section 56*, "the salary allowed to the Accountant shall be in lieu of all fees and emoluments whatsoever, and the Accountant shall not, directly or indirectly, receive any sum either for commission, brokerage, or otherwise, but only the sum expressly allowed to him as his salary; and from henceforth the broker shall transact the brokerage business of the Accountant's office upon such terms as the Accountant, and any two of the Commissioners of the Court of Bankruptcy, to be appointed by the Lord Chancellor, shall, with the approbation of the Lord Chancellor, determine; and the sum paid to the broker shall be charged by the Accountant to the estate for which the investment or sale shall be made; and when such sum to be paid to the broker shall be determined, it shall be lawful for the Lord Chancellor to direct the payment, or any part of it, to be made from such time retrospectively and prospectively as to him may seem just."

By the 7 & 8 Vict. c. 70, various provisions are made for facilitating arrangements between debtors and creditors, where the debtor is not a trader within the meaning of the Bankrupt Laws, the provisions of which act are, like those of the 5 & 6 Vict. c. 116, to be executed by the Commissioners of the Court of Bankruptcy.

RULES AND ORDERS

Made under the 7th and 8th Vict. c. 96, s. 38, for the better carrying into execution the Statute 5th and 6th Victoria, c. 116, as amended by the said Statute 7th and 8th Victoria, c. 96.

21st December, 1844.

IT IS ORDERED AS FOLLOWS; that is to say,

1. That every petition for protection from process presented to the Court of Bankruptcy or to any District Court of Bankruptcy, under the provisions of the Statutes 5 & 6 Vict. c. 116 and 7 & 8 Vict. c. 96, shall be taken to the Chief Registrar of the Court of Bankruptcy in Basinghall Street, or to a Registrar of the District Court of Bankruptcy in the Country (as the case may be in London or in the Country) between the hours of eleven o'clock in the forenoon and two o'clock in the afternoon, who shall file and number such petition, and such Chief Registrar or Registrar shall thereupon allot such petition by ballot, or in rotation, to one of the Commissioners in London, or of the District Court in the Country (where there are two Commissioners), and shall forthwith certify to such Commissioner the filing of such petition and such allotment to him, which certificate shall be filed with the proceedings in the matter of such petition, and such petition shall be prosecuted before such Commissioner, or before the District Commissioner, where there is only one Commissioner: Provided always, that any one Commissioner in London or in the Country may, in the absence of any other Commissioner, act for him: Provided also, that where a petition shall have been previously filed by the same Petitioner, whether such petition shall have been dismissed or not, the new petition shall be allotted to the Commissioner to whom the first petition was allotted.

2. That the schedule to such petition shall be annexed at the time of filing such petition, and shall be, *mutatis mutandis*, in the form in use under the 5 & 6 Vict. c. 116.

3. That in all cases in which a Petitioner shall be in custody, there shall be filed with his petition a certificate from the gaoler of the cause or causes of the detention of the Petitioner.

4. Every Petitioner shall deliver with his petition an account in writing in the form set forth in the schedule marked (B. No. 1), annexed to these Orders, signed by the Petitioner, of all his books of account and vouchers, and of all his personal estate and effects then in his possession or control, or in the possession or control of any other person by his authority or in trust for him, and the place or places where the same then are or are believed to be, and whether the same are liable for rent or any other charge, and to whom by name, and the particulars of the demand, in order that such property may be duly ascertained and given up to the Official Assignee or the Messenger, and that the said account shall be signed and delivered in duplicate.

5. That one copy of the estate paper mentioned in the preceding Order shall be forthwith transmitted to the broker appointed by the Court, and such broker shall forthwith proceed to appraise the personal estate and effects of such Petitioner, and shall make such return as is set forth in the schedule marked (B. No. 2), annexed to these Orders.

6. That the warrant of seizure or possession to be granted to the Messenger under any petition shall be in the same form, *mutatis mutandis*, as that now in use in Matters of Bankruptcy, and shall be issued in the same manner, but the same shall not be executed without the special direction of the Commissioner or of the Assignee or Assignees for the time being.

7. That every Petitioner shall, immediately after an Official Assignee shall have been appointed to his estate, deliver over to the Official Assignee so appointed all monies, bills, notes and securities in his possession or power, together with all books of account, papers and writings relating to his estate and effects.

8. That the protection from process to be given to any Petitioner upon or after filing his petition shall be called the

RULES AND ORDERS.

CXXXV

"Interim Order for Protection," and shall be prepared in duplicate in the form set forth in the schedule marked (C. No. 2), annexed to these Orders, one copy to be filed with the proceedings.

9. That where a Petitioner for protection from process shall be a prisoner in execution upon any judgment obtained in any action for the recovery of any debt, such Petitioner shall before the granting of the Interim Order for Protection give such notice to the detaining creditor under such execution as the Court in which the petition is prosecuted shall direct, so that such creditor may be heard against the granting of the Interim Order and the discharge of such Petitioner out of custody.

10. That the Order for discharging out of custody (under section 6 of 7 & 8 Vict. c. 96), any petitioner being a prisoner in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule, shall be in the form set forth in the schedule marked (C. No. 3), annexed to these Orders, and shall be prepared in duplicate, one copy to be filed with the proceedings.

11. That the time for making a final Order, unless cause be shown to the contrary, in the matter of each petition, shall be appointed by the Commissioner acting in the same; of which time the Commissioner shall cause notice to be given ten days at least before the time so appointed, which notice shall be by advertisement in the form set forth in the schedule marked (E. No. 1), annexed to these Orders.

12. That the final Order shall be made in duplicate, one copy to be filed with the proceedings, and one copy to be delivered to the Petitioner.

13. That previous to making any application to the Court for any order or orders under sections 28 and 29 of the 7 & 8 Vict. c. 96, the Petitioner shall give such notice of the application by advertisement, and to the creditors of the Petitioner, as the Court, under the circumstances of the case, shall think fit to direct.

14. That all bills of fees and disbursements of any Attorney or Messenger for business done under the aforesaid Act shall be taxed by the Court in which the petition shall have been filed, or by the Taxing Master of the Court of Bankruptcy: Provided always, that no charge shall be made by the Mes-

senger for executing the warrant of seizure or possession, unless the execution thereof shall be specially directed by the Court.

15. That the fees authorized in the annexed Table, and no other, shall be taken in the respective Courts.

16. That the several forms set forth in the Schedule annexed to these Orders shall, *mutatis mutandis*, be used in the respective Courts.

—◆—

F E E S

To be received and taken by, or accounted for and paid over to, the Chief Registrar of the Court of Bankruptcy, and to be paid by him as directed by the 7 & 8 Vict. c. 96, s. 50.

| | £ | s. | d. |
|--|---|----|----|
| On filing petition..... | 0 | 1 | 0 |
| On swearing every affidavit | 0 | 1 | 6 |
| On filing affidavits and other document | 0 | 1 | 0 |
| For every search | 0 | 1 | 0 |
| For an office copy of the schedule and accounts
annexed, for the Official Assignee, unless the
Petitioner has delivered one at the time of filing
his petition, per folio of ninety words | 0 | 0 | 1½ |
| For every sitting in the matter of any petition, by
way of charge for the use of the Court..... | 0 | 5 | 0 |

| | | |
|--|---|----------------|
| CHAS. FRED. WILLIAMS,
JOSHUA EVANS,
R. G. C. FANE,
EDWARD HOLROYD,
EDWARD GOULBURN,
HENRY J. STEPHEN,
EDMUND R. DANIEL,
MONTAGUE B. BERE, | } | Commissioners. |
|--|---|----------------|

Approved,
LYNDHURST, C.

RULES AND ORDERS

Made under the 7th & 8th Vict. c. 70, s. 14, for the better carrying into Effect the several Purposes of the said Act.

January 11th, 1845.

IT IS ORDERED AS FOLLOWS; that is to say,

1. That petitions under this Act shall be delivered, fairly written on parchment, to the Registrar of the day sitting at the Court of Bankruptcy, between the hours of eleven and two, who shall number the same as they are received, and at the rising of the Court shall allot the petitions by ballot among the Commissioners of the Court of Bankruptcy in London and the Commissioners of the Country Districts, regard being had to the usual place of residence of the Petitioner, the residences of the major part in number and value of his creditors, and the situation of the property to be administered; and every petition, and the number and allotment thereof, shall be entered in the private minute book of the Commissioner of the day: Provided, that if for any sufficient cause, agreed by any two Commissioners, any Commissioner shall decline to act in the matter of any petition, or other cause shall be shown for altering the allotment, such petition shall be allotted in such manner as such two Commissioners shall direct.

2. That two fair copies of every such petition shall be delivered to the said Registrar at the same time with the original petition, one for the use of the Commissioner to whom the same shall be allotted, and one for the use of the person to be appointed to preside at the meetings and for the inspection of creditors.

3. That the sum of ten pounds, or such other sum not exceeding twenty pounds, as the Commissioner to whom the petition is allotted shall direct, shall be deposited with the Messenger previous to the appointment of any meeting of creditors for the costs of such meeting or meetings, the costs of serving notices upon creditors, and other necessary expenses; the residue, if any, after payment of such expenses, to be accounted for to the Petitioner.

4. That the notices required by the second section of this Act shall be transmitted through the post by the Messenger of the Court, who shall be allowed the sum of four pence and no more for the filling up of the forms, addressing the same, the Messenger's signature, and the postage stamp.


5. That the notices required by the fourth, eleventh and twelfth sections of this Act shall be served by the Messenger of the Court (if within ten miles of the General Post Office or of the Court), or by his agent, if at a greater distance.

6. No person, not being a creditor, or the authorized agent or attorney of a creditor, except the appointed president and one clerk, and the Petitioner, accompanied by two persons, shall be permitted to be present at any meeting, or to inspect the petition, schedule or other document, unless so directed in writing by the Commissioner.

7. The forms set forth in the annexed schedule shall, *mutatis mutandis*, be used under this Act.

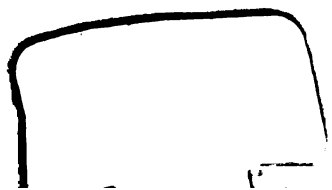
| | |
|------------------------|-------------------|
| CHAS. FREED. WILLIAMS. | E. LUDLOW. |
| JOSHUA EVANS. | N. ELLISON. |
| JOHN S. M. FONBLANQUE. | EDMUND R. DANIEL. |
| R. G. C. FANE. | M. J. WEST. |
| EDWARD HOLROYD. | C. PHILLIPS. |
| EDWARD GOULBOURN. | W. THO. JEMMETT. |
| WALKER SKIRROW. | MONTAGUE B. BERE. |
| HENRY J. STEPHEN. | RICHD. STEVENSON. |
| JOHN BALGUY. | |

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